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PROTECTED CLASS RATIONAL BASIS REVIEW*

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It is commonplace today to associate rational basis review exclusively with groups that are not formally afforded heightened scrutiny under the Supreme Court's equal protection precedents: groups like gays and lesbians, people with disabilities, and undocumented immigrants. Thus, discussions of the benefits of nurturing a jurisprudence of meaningful rational basis review typically focus exclusively on such "unprotected" groups. In contrast, rational basis review is rarely thought of as providing important protections for groups such as racial minorities and women, who have secured "protected class" status and therefore are

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Note from the Editors: with respect to the sources on file with the Women's Law Fund Records, the Editors have deviated from ordinary substantiation practices and have relied solely on the author's review of these sources.

subject to regular heightened review of group-burdening classifications.

Drawing on extensive original archival research, this Article challenges this common conception. Race and sex discrimination litigators have often historically relied on rational basis arguments as a complement to heightened scrutiny. And during eras when robust rational basis review was prevalent—such as the 1970s—these claims have often succeeded. Today, as a result of, inter alia*, the LGBT rights cases (which have expanded judicial conceptions of the scope of rational basis review), we stand at a moment of increased possibility for meaningful rational basis review. Rational basis arguments thus ought to form a part of how we conceptualize the contemporary possibilities for race and gender justice claims.*

Such an approach has the potential to revitalize what has long been a stalled constitutional jurisprudence around sex and race discrimination. As many scholars have acknowledged, it is extraordinarily rare for courts today to find that a government actor engaged in intentional discrimination against women or racial minorities—the contemporary standard for triggering heightened scrutiny. But as the history unearthed herein demonstrates, courts (especially lower courts) have, at times, been willing to find that racially and gender-impactful laws violate rational basis review. Moreover, such review has often had the capacity to undermine widely shared assumptions regarding the rationality of entrenched structures of race and gender oppression. As such, protected class rational basis review may present one of the few realistic alternatives for reviving a meaningful project of race- and gender-based constitutional change today.

INTRODUCTION[1]

In 1976, in the case of *Washington v. Davis*,[2] the Supreme Court famously held that a racially discriminatory purpose—not discriminatory effects alone—must be shown to prove race discrimination under the equal protection clause.[3] Absent from the Court's opinion—and thus largely forgotten today—is the fact that the plaintiffs in *Davis* explicitly rejected this framing of the case.[4] Thus, plaintiffs' counsel in *Davis* eschewed any argument that the standards applicable to racial classifications should be applied, and instead agreed with the defendant that the Court's lowest standard of scrutiny, rational basis review, was applicable.[5] But, the plaintiffs' counsel contended, "the only rational basis for the use of a test is that it does the employer some good . . . , and it has not been proved here."[6] Thus, he argued, the test that the plaintiffs challenged should be deemed unconstitutional under rational basis review—regardless of whether it could be considered racially discriminatory.[7]

The plaintiffs' counsel in *Davis*—eminent civil rights lawyer Richard Sobol—was not alone in embracing rational basis arguments for racial justice in the 1970s.[8] Rather, prominent groups such as the NAACP Legal Defense Fund ("LDF"), the American Civil Liberties Union ("ACLU"), and the National Education Association ("NEA") all deployed rational basis arguments in order to challenge laws with

1. This paper is the second in a series of papers examining lessons from the denouement of the early sex and illegitimacy cases for the contemporary moment that we find ourselves in vis-à-vis the LGBT rights cases and equal protection doctrine. *See* Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014) [hereinafter Eyer, *Constitutional Crossroads*]; Katie Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. (forthcoming 2017) [hereinafter Eyer, *The Canon*].

2. 426 U.S. 229 (1976).

3. *Id.* at 239–40.

4. *See id.* at 238 & n.8; *see also infra* notes 5–6 and accompanying text (describing the plaintiffs' counsel's oral argument in *Davis*, which declined to focus on race discrimination, and instead argued that the government classification at issue failed rational basis review).

5. Transcript of Oral Argument at 57, *Davis*, 426 U.S. 229 (No. 74-1492).

6. *Id.*

7. *Id.* at 55–56.

8. *See, e.g.*, *Louisiana to Out-of-State Lawyers: Get Out*, NEW REPUBLIC, Feb. 24, 1968, at 17–18 (describing Sobol's early accomplishments as a civil rights lawyer).

racially discriminatory effects—often with surprising levels of success.[9] Thus, across a host of cases during this time frame—including education- and employment-related testing regimes, felon employment bans, educational tracking systems, and welfare requirements[10]—racial justice advocates succeeded in persuading the courts that the government action at issue failed to satisfy even the minimum standards of equal protection scrutiny.[11] So too, sex equality advocates often pushed successfully for the invalidation of government actions having a disparate impact on women under the rubric of rational basis review—most notably successfully challenging discriminatory pregnancy policies and welfare policies adversely impacting poor African American women.[12] Thus, as this Article unearths, there was once a prominent, and successful, tradition of "protected class rational basis review"[13] practiced by equality-based social movements.

9. *See generally infra* Part II (detailing this history extensively).

10. *See infra* notes 93–94 and accompanying text.

11. *See, e.g.*, *infra* note 94 and accompanying text (citing cases in which the courts found for racial justice litigants on rational basis review).

12. *See generally infra* Part III (detailing this history extensively). The use of rational basis arguments by sex equality advocates is more complicated to characterize as protected class rational basis review as many courts generally treated sex discrimination claims during this era as triggering only rational basis review. *See infra* Part I. However, gender equality advocates often used this to their advantage, persuading courts that they need not demarcate the outer boundaries of what is "sex discrimination," given the failure of the relevant classifications even under prevailing standards of rational basis review. *See generally infra* Part III (describing in detail the ways that rational basis review allowed courts to sidestep complicated questions regarding the outer boundaries of what could be considered sex discrimination).

13. This Article uses the term "protected class rational basis review" simply to refer to the use of rational basis review to achieve the objectives of those who are within the protected classes, such as racial minorities or women. Often, today, this will involve using rational basis review to target racially or gender-impactful laws in contexts where courts are unwilling to deem the law intentionally discriminatory (and thus to apply heightened scrutiny). Note that this Article does *not* necessarily mean by the use of this term to connote a form of heightened rational basis review that is only available to protected classes (triggered, for example by a showing of racial or gender disparities). Rather, most of the cases described herein—both historical and modern—have simply relied on the existing ambiguity in rational basis review doctrine (created by the longstanding instability and inconsistency in the doctrine) to read that doctrine as allowing the application of meaningful back-end review. *See infra* Parts III–V. *See generally* Eyer, *The Canon*, *supra* note 1 (discussing the varied history of social movements' successful use of rational basis review, and that it has often involved such a messy back-end approach); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (suggesting the possibility that the Supreme Court had, across the board, adopted a more meaningful approach to rational basis review).

Today, this tradition of "protected class rational basis review" is largely forgotten.[14] Aspiring lawyers are taught to associate the claims of "protected classes"—such as women and racial minorities—with heightened scrutiny.[15] Rational basis review is generally thought to apply to everything else—the claims of those groups that have not yet achieved protected status as well as the review of general economic legislation.[16] Under this framework, the claims of protected classes are generally understood as being coextensive with—and limited to—the circumstances in which plaintiffs can make a showing of race or sex discrimination sufficient to trigger heightened review.[17] As such, cases that have limited the circumstances in which such discrimination will be found—such as *Washington v. Davis*[18] and *Geduldig v. Aiello*[19]—are often understood as demarcating the outer boundaries of contemporary race and gender justice claims.

This Article revisits the history of protected class rational basis review, and suggests that it is time to rethink the common contemporary

14. Racial justice plaintiffs have continued to at times rely on rational basis arguments, sometimes successfully, into the modern era. *See, e.g.*, *infra* notes 434, 438 and accompanying text (citing cases that have invalidated or questioned measures with a racial impact on rational basis review). But the common modern approach to teaching and understanding equal protection doctrine is to associate the claims of racial justice plaintiffs exclusively with heightened scrutiny. *See infra* note 15 and accompanying text.

15. This Article uses the term "heightened scrutiny" throughout to refer to intermediate scrutiny and strict scrutiny. Although arguably more meaningful forms of rational basis review (often referred to by scholars as "rational basis with bite") could be characterized as a form of heightened scrutiny (perhaps a sub-intermediate tier), I think that such a characterization is neither helpful to those pursuing equality goals (for reasons discussed in Part IV), nor descriptively accurate. In fact, both the Court and the lower courts have used a wide array of approaches to rational basis review—some more meaningful in the scrutiny they afford, some less so—typically without suggesting that they are applying different or "heightened" standards of review. For examples of pedagogical materials that associate the claims of women and minorities with heightened scrutiny, see WILLIAM D. ARAIZA & M. ISABEL MEDINA, CONSTITUTIONAL LAW: CASES, HISTORY, AND PRACTICE 937, 970, 1042–43, 1133, 1143, 1190–210 (4th ed. 2011); RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 925–26, 989–90 (1st ed. 2008); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 601–02, 715 (18th ed. 2013); RUSSELL L. WEAVER ET AL., CONSTITUTIONAL LAW: CASES, MATERIALS, & PROBLEMS 760 (2d ed. 2011).

16. *See* sources cited *supra* note 15.

17. *See* sources cited *supra* note 15; *see also* SULLIVAN & FELDMAN, *supra* note 15, at 643 (implying strongly that laws having only racially disparate impact are not unconstitutional under *Washington v. Davis*); WEAVER, *supra* note 15, at 798 (stating that "[i]n Washington v. Davis, the Court confirmed that purposeful discrimination was a threshold requirement for a viable equal protection claim"—rather than simply a requirement for triggering heightened scrutiny).

18. 426 U.S. 229, 239–40 (1976) (holding that disparate impact alone does not trigger strict scrutiny).

19. 417 U.S. 484, 496 n.20 (1974) (stating that pregnancy discrimination is not per se sex discrimination).

way of understanding the relationship of protected classes to the equal protection clause.[20] In an era when the courts'[21] minimum standards of equal protection scrutiny are once again increasingly meaningful,[22] there is no reason why heightened scrutiny alone should form the basis of our conception of the constitutional protections afforded "protected class" minority groups.[23] Rather, such an exclusive focus unnecessarily circumscribes possible claims for race or gender justice by treating the need to trigger heightened scrutiny—and thus satisfy the difficult standards of proving race or sex "discrimination"—as a precondition to race and gender justice claims.[24] But this is simply not the case; as the

20. Although the discussion herein is focused on equal protection, some of the successful rational basis arguments raised by protected group members historically have been situated under the due process clause instead. *See, e.g.*, sources cited *infra* notes 93–94. In both circumstances, the existence of a meaningful tradition of invalidating government action where it is arbitrary or irrational marks the key opening for permitting such arguments. *See* sources cited *infra* notes 93–94; *cf.* Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 246–47 (1957) (holding denial of permission to sit for the bar on the basis of history of membership in the Communist party, among other things, to be irrational under the due process clause—later relied on in both equal protection and due process "protected class rational basis" arguments in the 1970s).

21. I use the term "courts" advisedly here, rather than "the Court," because the phenomenon identified herein is not limited to the Supreme Court, and indeed seems likely to have its greatest potential in the lower and state courts. *See generally infra* Part IV (discussing the potential of "protected class rational basis review," especially in the state and lower courts).

22. In the Supreme Court, this trend has primarily been confined to the LGBT rights cases. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013); Romer v. Evans, 517 U.S. 620 (1996). *But cf.* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (per curiam) (applying meaningful rationality review in the modern era outside of the LGBT rights context). But in the lower courts, the focus of the discussion here, it has spread much farther. *See infra* note 31 and accompanying text.

23. *Cf.* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3172–83 (2015) (making a similar observation in the context of a proposal to adopt a "proportionality" approach to U.S. constitutional law). This Article focuses on the potential of the present moment for those within the protected classes, i.e., racial minorities and women. In other work, I have also explored the potential benefits of the current moment for those who remain outside the heightened tiers (such as people with disabilities, undocumented immigrants, and others). *See generally* Eyer, *Constitutional Crossroads*, *supra* note 1 (describing the ways that the contemporary LGBT rights cases open up space for other groups outside of the heightened tiers to make rational basis arguments).

24. Under the "tiers of scrutiny," approach that the Court has embraced since the late 1960s, laws targeting "protected classes" (race, sex, illegitimacy, alienage) receive heightened scrutiny—but only if they can meet the gatekeeping requirements of cases such as *Davis* and *Geduldig*. *See, e.g.*, Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 173–80 (2016). Thus, laws that facially classify on the basis of protected class status or that can be shown to be intentionally discriminatory receive heightened scrutiny (with high likelihood of being invalidated), but those that only have a disparate impact do not receive such heightened scrutiny. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 542 (7th ed. 2013). However, *all* laws remain subject to what some of the justices have referred to internally as "minimum scrutiny[,]" i.e., rational basis review. *See, e.g.*, Memorandum from Justice William

minimum scrutiny that the courts afford, rational basis review is always available—even where litigants fail to persuade a court to find intentional race or gender discrimination.[25] And, as the history of protected class rational basis review demonstrates, such review can lead to the invalidation of racially and gender-impactful laws. As such, while heightened scrutiny arguments will, and perhaps should, continue to form the basis for many race and gender justice claims, these arguments ought not be conceptualized as representing the outer limits of the possible.[26]

Whether revitalizing the tradition of protected class rational basis review would generate more favorable results for racial and gender minorities remains to be seen. Rational basis review has long been thought of as an extraordinarily deferential, almost meaningless, form of review—which might suggest its limited utility for any social justice

H. Rehnquist to Justice Lewis F. Powell, Jr. re: Mass Bd. of Ret. v. Murgia, No. 74-1044, at 5 (May 25, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) (using the term "minimum scrutiny test"). Thus, the same standards of review that apply to unprotected groups (such as the LGBT community, people with disabilities, and undocumented immigrants) also extend to the classifications imposed by racially or gender-impactful laws. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (stating that all statutory classifications "that neither proceed[] along suspect lines nor infringe[] fundamental constitutional rights" are subject to rational basis review).

25. *See* Memorandum from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr., *supra* note 24, at 5 (showing Justice Rehnquist using the term "minimum scrutiny test" to refer to the type of review that the court performs where formal heightened scrutiny does not apply).

26. While there are some scholars who argue that the tiered system of scrutiny either is descriptively approaching its demise or normatively ought to be, *see, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482–94 (2004), I express no opinion on either of these related issues herein. Rather this Article suggests only that—within the tiered framework of scrutiny that currently exists—rational basis review ought to be taken seriously as one way of bringing claims on behalf of those even within the heightened tiers. Relatedly, it is worth noting that "protected class rational basis review" would not necessarily alleviate all of the difficulties that have caused scholars to call for the demise of the tiered approach, including, most notably, the use of heightened scrutiny to derail affirmative action efforts.

Although this issue too exceeds the scope of this Article, I note that although I believe rational basis review has greater potential than is often recognized, I also believe there are benefits for groups seeking protections that come with a finding of heightened scrutiny—benefits that most likely exceed the drawbacks (such as constitutional attacks on group-based affirmative action). *See, e.g.*, Katie Eyer, Brown*, Not* Loving*:* Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J.F. 1, 7–11 (2015). I think this is especially so for the most marginalized within a group (such as prisoners, low-income individuals, and youth), most of whom will benefit, if at all, from the law as a result of deterrence and moral norms shifts, rather than litigation-based results. *Id.* at 9–11. Thus, I think groups that stand a realistic possibility of achieving heightened scrutiny—like the LGBT rights movement—have a real interest in pursuing and achieving heightened scrutiny; although, as described herein, there are reasons why they too may have an interest in ensuring the continued robustness of rational basis review, in both the lead-up to, and even after they enter the heightened canon.

campaign.[27] But, as I have written elsewhere, this characterization substantially oversimplifies what is, in reality, a messy and inconsistent jurisprudence—one that has often afforded meaningful opportunities to social movements seeking to disrupt the status quo.[28] Thus, although canonical accounts of rational basis review would dismiss its potential significance for achieving social movements' equality goals, the history of equality struggles tells a different story—one of significant, albeit partial, opportunities for sparking constitutional change.

As importantly, the present moment is one of markedly enhanced opportunities for rational basis review. The Court's recent LGBT (lesbian, gay, bisexual, transgender) rights cases—which the Court has declined to situate as a form of heightened scrutiny review—have increasingly destabilized deferential formulations of rational basis review.[29] And, contemporary rational basis victories have not been limited to the LGBT rights context; but rather have spread to an array

27. *See, e.g.*, Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desireable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402, 410 (2016) (describing the rational basis standard as "enormously deferential to the government" and "almost empty"). For a description of the canonical account of rational basis review (as weak and useless), as well as the way this account mischaracterizes and overlooks the ways that rational basis review has been used successfully by social movements, see generally Eyer, *The Canon*, *supra* note 1 (describing the deep divide between the canonical account of rational basis review and the ways that social movements have successfully used rational basis review to effectuate constitutional change).

28. *See generally* Eyer, *The Canon*, *supra* note 1 (describing the many contexts in which rational basis review has historically opened up opportunities for constitutional change, including, among others, the critical role of rational basis review in the LGBT rights movement's campaign for same-sex marriage; securing meaningful equal protection scrutiny for women, nonmarital children, and gays and lesbians; the demise of the crack/cocaine disparity; and many other arenas in which rational basis review has afforded social movements opportunities to generate constitutional change); Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 382 (2012) (listing examples of the Supreme Court's use of "rigorous rational basis scrutiny" to provide avenues for constitutional change).

29. *See, e.g.*, Eyer, *Constitutional Crossroads*, *supra* note 1, at 569 (discussing the ways that the Court's contemporary LGBT rights cases place pressure on the deferential formulation of rational basis review); *cf.* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 284 (2015) ("The rational basis test is enjoying a bit of a comeback."). I am not the first scholar to observe the potential of the LGBT rights cases for contemporary race and gender justice claims. For two recent accounts by leading scholars, see Robinson, *supra* note 24, at 153–58 (arguing that there are important ways that the Court's recent LGBT rights cases afford more significant protections than the Court's existing heightened scrutiny jurisprudence, and arguing that their principles should be extended to race and sex cases); and Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 4 (2013) (observing the "differences in empathy . . . within and across" the Supreme Court's contemporary racial justice and LGBT rights precedents, and urging consideration of what a jurisprudence of renewed racial empathy might look like).

of contexts in the lower and state courts[30]—including racial justice domains.[31] Thus, although no doctrinal innovation (including rational basis review) is likely to be a panacea for the limitations of contemporary race and gender justice litigation, both contemporary doctrine—and historical inquiry—suggest that rational basis review may provide a way around some of its most intractable barriers.

Moreover, even if the victories under a protected class rational basis review approach are piecemeal, its potential for restarting our stalled constitutional conversation around race and gender injustice is important. Today, one of the principal obstacles to continued progress for race and gender justice is the invisibility of the structures of race and gender subordination—coupled with widely shared assumptions that such structures are natural and justified.[32] Protected class rational basis review—by focusing on the thin underpinnings of many racially and gender-impactful laws—holds the possibility of disrupting these widely shared assumptions.[33] In short, to the extent that we desire to denaturalize and ultimately delegitimize existing structures of race and gender oppression, it may be precisely through undermining widely shared assumptions of rationality that we make the greatest progress.

Experience with protected class rational basis review—both historically and today—suggests that just such a delegitimizing dynamic

30. Generally, when I use the term "lower courts" herein, I use it to signify the lower federal courts, including the federal district courts and courts of appeals. When I intend to signify state courts as well, I use the more inclusive term (used here) "lower and state courts."

31. *See, e.g.*, Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1065–67 (9th Cir. 2014) (undocumented immigrants), *petition for cert. filed*, No. 16-1180 (U.S. Mar. 31, 2017); Bush v. City of Utica, 558 F. App'x 131, 134 (2d Cir. 2014) (refusal to provide emergency services in low-income neighborhood); United States v. Byars, No. 8:10CR50, 2011 WL 344603, at *11–12 (D. Neb. Feb. 1, 2011) (crack/cocaine disparity); Mason v. Granholm, No. 05-73943, 2007 WL 201008, at *3–4 (E.D. Mich. Jan. 23, 2007) (prisoners); Lewis v. Ala. Dep't Pub. Safety, 831 F. Supp. 824, 825–29 (M.D. Ala. 1993) (criminal records discrimination in employment); Nixon v. Commonwealth, 839 A.2d 277, 288–90 (Pa. 2003) (criminal records discrimination in employment); State v. Russell, 477 N.W.2d 886, 888–91 (Minn. 1991) (crack/cocaine disparity). Several of the government policies successfully challenged on rational basis review in recent years—including criminal records discrimination and the crack/cocaine disparity—have been recognized to be significant racial justice priorities in view of their impact on racial minorities. *See, e.g.*, *Ban the Box*, NAACP, http://www.naacp.org/campaigns/ban-the-box/ [https://perma.cc/RSB4-TXZJ] (describing the reasons why criminal records discrimination in employment is especially problematic for people of color in view of their disproportionate mass incarceration); *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ [https://perma.cc/R54J-ESBH] (identifying the crack/cocaine disparity as a critical explanatory factor in the mass incarceration of racial minorities).

32. *See infra* note 450 and accompanying text (addressing this issue).

33. *Cf.* Siegel, *supra* note 29, at 91 ("By unsettling judgments about legitimacy, equality law can amplify the voices of those who challenge tradition, even as it encourages inequality to assume new forms.")

is indeed possible. As this Article details, racial justice advocates and women's rights organizations made extensive use of rational basis arguments to challenge racially and gender-impactful laws during the 1970s—often with striking levels of success.[34] In the course of such litigation, common racialized and gendered assumptions—including the presumed connection of standardized test scores to employee competency, the fairness and neutrality of school "tracking" systems, the unfitness of unwed mothers to teach, and the inability of pregnant women to do their jobs—were questioned and often rejected by lower court judges, and sometimes by the Supreme Court itself.[35] Moreover, even where the Supreme Court ultimately sidestepped such protected class rational basis arguments, lower court litigation—and the shift in public views it helped to bring about—often ultimately culminated in other forms of durable legal or social change.[36]

34. *See infra* Parts II–III.

35. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401, 511–14 (D.D.C. 1967), *aff'd on other grounds*, 408 F.2d 175 (D.C. Cir. 1969) (public school tracking systems); *infra* notes 101–65 and accompanying text (standardized test scores and employee competency); *infra* notes 248–91 and accompanying text (pregnancy); *infra* notes 372–418 and accompanying text (unwed mothers).

36. One prominent example of this can be seen in the women's rights movement's litigation campaign challenging mandatory maternity leave policies and other forms of pregnancy discrimination in the early 1970s. As described in Section III.A, this litigation campaign was highly successful, primarily through the use of rational basis arguments. *See generally* Section III.A (arguing that there was no rational basis for treating pregnancy any differently than other temporary disabilities). Although the Supreme Court held in 1974 in *Geduldig v. Aiello* that pregnancy discrimination was not sex discrimination (and that the classification there was rational), 417 U.S. 484, 496–97 & n.20 (1974), the ideas that the women's rights movement forwarded through, *inter alia*, this campaign—and that many judges endorsed on rational basis review—were sufficiently well entrenched by the mid-1970s that when the Court extended its *Geduldig* holding to Title VII in 1976, *see* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 133–36 (1976), Congress promptly amended the law to incorporate explicit pregnancy discrimination protections for both public and private employees. *See generally* S. COMM. ON LABOR & HUMAN RES., 96TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 (Comm. Print 1979) (recording the remarks of legislators, drawing extensively on arguments made by feminist litigators—and endorsed by judges—in the early pregnancy discrimination cases, which questioned the rationality and fairness of distinguishing pregnancy from other forms of temporary disabilities). Interestingly, it appears that the undermining of the justifications for pregnancy discrimination also dovetailed with legislators' ability to "see" pregnancy discrimination as sex discrimination. *See generally id.* (showing that by the time the Pregnancy Discrimination Act was enacted, legislators perceived pregnancy discrimination as irrational and unfair, as well as perceiving it as sex discrimination). For fascinating, and far more comprehensive, accounts of the history of the the Pregnancy Discrimination Act and the debates within the feminist movement over how to conceptualize pregnancy discrimination that preceded it, see generally Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961 (2013); and Kevin Schwartz, *Equalizing Pregnancy: The Birth of a Super-*

Similarly, today, one can see such dynamics at work in the arenas where protected class rational basis arguments continue to be made.[37] For example, the crack/cocaine sentencing disparity, once widely embraced as necessary to address a serious social policy problem, has today seen its underpinnings so thoroughly undermined that it has been radically reduced—and may soon be eliminated.[38] While the judicial role in this process has been largely overlooked (perhaps because it has been confined to the less visible lower and state courts), judges—relying on rational basis review—were among the earliest establishment figures to lend credence to the arguments of racial justice advocates that the crack/cocaine disparity lacked meaningful justification.[39] And, as those justifications have been undermined, the racially discriminatory nature of the policy has become increasingly intelligible to policymakers as well.[40] In short, even today, protected class rational basis review can—and has—continued to play a role in addressing issues of substantial importance to racial and gender justice advocates.

As the forgoing discussion suggests, understanding the potential of protected class rational basis review requires departing from a singular focus on Supreme Court-centric strategies for constitutional change. Rather, most of the success of protected class rational basis review—historically and today—has derived from the ability of social movements to harness the indeterminacy of the Supreme Court's rational basis jurisprudence in making arguments in the lower courts—arguments which, in turn, have helped to generate further social and legislative change.[41] As scholars such as Reva Siegel and Robert Post have theorized in other contexts, it is this type of messy and multi-sited constitutional dialogue—between social movements and an array of

Statute (2005) (Yale Law Sch. Student Prize Papers No. 41, 2015), http://digitalcommons.law.yale.edu/ylsspps_papers/41/ [http://perma.cc/F429-R692].

37. The type of "protected class rational basis" arguments I discuss herein appear to have become less common following the 1970s, in part because of shifting strategic incentives for litigators (as a result of heightened scrutiny being afforded to sex discrimination, as well as the addition of public employees to the coverage of Title VII), and in part because of overall shifts in rational basis standards away from meaningful rational basis review. *See infra* notes 429–35 and accompanying text. Nevertheless, there have continued to be contexts in which race and gender justice organizations have successfully deployed this type of reasoning.

38. As discussed *infra*, the crack/cocaine disparity was once widely perceived as necessary to address the social ills understood to be uniquely associated with crack, a perception that has been thoroughly undermined. *See infra* notes 464–72 and accompanying text. As described *infra*, judges interrogating the disparity on rational basis review have played an important role in the evolution of the perception of the disparity's lack of justification. *See infra* notes 464–72 and accompanying text.

39. *See infra* notes 464–72 and accompanying text.

40. *See infra* notes 464–72 and accompanying text.

41. *See infra* Parts II–IV.

other legal and social actors—that has opened up opportunities for change, even as such change has remained largely invisible in mainstream canonical accounts.[42]

Taking protected class rational basis review seriously also challenges us to question prevailing accounts of where meaningful rational basis review is available. As I have written elsewhere, the two dominant ways that the canon accounts for the existence of meaningful rational basis review—"animus" and "rational basis with bite"—are descriptively incomplete and substantively problematic, insofar as they are situated as the exclusive pathways "in" to more meaningful forms of rational basis review.[43] Rather, as the history of protected class rational basis review reminds us, there are a wide array of messy approaches that the courts have taken to meaningful rational basis review—including many which ignore the need for any threshold showing and simply apply meaningful rationality review.[44] To the extent that we wish to preserve and expand pathways for undermining the legitimacy of racial and gender oppression, we ought to view with concern the ways that the contemporary canon erases this messy "back end" practice and seeks to impose gatekeeping requirements to meaningful rational basis review which the current doctrine does not demand.

* * *

In short, there are substantial reasons to believe that protected class rational basis review holds real promise for race and gender justice litigation today. However, realizing that promise may depend on our willingness and ability to look beyond the common sense wisdom of how rational basis review operates to the messy reality of how rational basis review has been (and is today) actually applied. This Article seeks to do so by introducing readers to protected class rational basis review through an extensive study of its practice during its most successful and prominent era—the 1970s.[45]

42. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378–87 (2007) (developing the theory of democratic constitutionalism); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1413–17 (2006) (same); *infra* Parts II–IV.

43. *See* Eyer, *The Canon*, *supra* note 1, at 36–45.

44. *See id.* at 46–47; *see also infra* Part IV (extensively describing how "animus" and "rational basis with bite" doctrines provide a reductive and misleading account of how rational basis review is actually applied by the courts); *infra* Parts II–III (describing the ways that protected class rational basis review was helpful to advocates precisely because it helped them to sidestep otherwise vexing threshold questions).

45. In other forthcoming work, I describe the descriptive inaccuracies in the contemporary canon of rational basis review, and how they artificially cabin our

Part I, by way of background, describes general developments in rational basis review during the late 1960s and the 1970s that facilitated the success of protected class rational basis review claims, and discusses the ways that those general developments are, to a significant extent, mirrored in contemporary equal protection law.

Part II turns to a discussion of 1970s-era racial justice rational basis claims. Section II.A describes the successful use of protected class rational basis review by racial justice advocates in the lower courts in the late 1960s and the 1970s—and the ways that such arguments permitted advocates to succeed without requiring courts to determine whether racial impact alone should be considered a form of race discrimination under the Fourteenth Amendment. Section II.B turns to the arrival of such arguments before the Court in the 1976 case of *Washington v. Davis*,[46] and describes the reasons why the Justices—who were simultaneously grappling more broadly with how to define the Court's approach to rational basis review—may have avoided directly addressing such arguments.

Part III then turns to sex equality litigation in the 1970s, and the role that protected class rational basis arguments played there. Section III.A describes the successful use of rational basis arguments by gender equality advocates in pregnancy discrimination contexts, and the Court's ambiguous response to such arguments in the cases of *Cleveland Board of Education v. LaFleur*[47] and *Geduldig v. Aiello*.[48] Section III.B then discusses the use of rational basis arguments in intersectional discrimination[49] contexts (often arising at the conjuncture of race-, sex-, and poverty-based discrimination) during this time frame, and their denouement before the Supreme Court in the cases of *King v. Smith*[50] and *Drew Municipal Separate School District v. Andrews*.[51]

Finally, Part IV discusses the implications of this history for race and gender justice today, and argues in favor of a revitalized tradition of protected class rational basis review. This Part also addresses possible

understandings of how rational basis review is actually used by social movements. *See generally* Eyer, *The Canon*, *supra* note 1 (discussing the ways that the contemporary canon obscures the rich history of the use of rational basis review by social movements to generate openings to create constitutional change).

46. 426 U.S. 229 (1976).

47. 414 U.S. 632 (1974).

48. 417 U.S. 484 (1974).

49. *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (seminal work developing the theory of intersectionality).

50. 392 U.S. 309 (1968).

51. 425 U.S. 559 (1976) (mem.) (per curiam).

critiques of such an approach to contemporary race and gender justice claims.

I. RATIONAL BASIS REVIEW DURING THE 1970S AND TODAY[52]

In 1972, writing in the *Harvard Law Review* foreword, Gerald Gunther observed "a new trend": the willingness of a majority of the Justices "to acknowledge substantial equal protection claims on minimum rationality grounds."[53] (Gunther famously referred to this as rational basis with "bite.")[54] Gunther's observations would prove to be prescient.[55] During the 1970s, robust forms of rational basis review—often resulting in the constitutional invalidation of the classifications complained of—would become increasingly common, in both the lower courts and in the Supreme Court itself.[56]

This turn toward robust forms of rational basis review was driven substantially by a number of cases decided by the Court in the early 1970s, in which it invalidated sex and illegitimacy classifications on

52. The discussion in this Part is drawn principally from a prior article addressing links between the Court's 1970s sex and illegitimacy discrimination precedents and the rise of robust rational basis review during that era. *See generally* Eyer, *Constitutional Crossroads*, *supra* note 1 (describing how the early sex and illegitimacy cases were linked to the rise of more meaningful forms of rational basis review in the 1970s). I owe a debt of gratitude to Earl Maltz, whose article unearthing the Supreme Court's debates over rational basis during this era originally drew me to this line of inquiry. *See generally* Earl M. Maltz, *The Burger Court and the Conflict over the Rational Basis Test: The Untold Story of* Massachusetts Board of Retirement v. Murgia, 39 J. SUP. CT. HIST. 264 (2014) (describing the Court's significant debates over rational basis review in the case of Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam)).

53. Gunther, *supra* note 13, at 19.

54. *Id.* at 20–24. Although "rational basis with bite" is the most common scholarly way of describing robust forms of rational basis review today, this Article generally does not use that term. In its modern usage, "rational basis with bite" is often understood to connote a special tier within rational basis review, bundled with its own gatekeeping requirements such as animus. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760, 763 (2011). *See generally* Eyer, *The Canon*, *supra* note 1 (describing extensively contemporary accounts of "rational basis with bite"). Because I think such an account of rational basis review oversimplifies existing doctrine and is not ultimately helpful to groups seeking equality reform, I avoid the term (and its associated connotations) herein. Instead, I principally use the broader term "robust rational basis review."

55. Gunther's observations in the foreword were also highly influential. Gunther's article was regularly cited, including by some of the Justices in their internal debates, to argue in favor of more robust forms of rational basis review. *See, e.g.*, Justice Lewis F. Powell, Jr., Draft Opinion re: Mass. Bd. of Ret. v. Murgia, No. 74-1044, at 10–17 (May 19, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers).

56. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 537–44; *see also* William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 522 (2005).

rational basis review.[57] For example, in the influential 1971 case of *Reed v. Reed*,[58] the Court concluded that an Idaho statute giving automatic preference to male executors was "arbitrary" and lacked a rational relationship to the state's objectives.[59] Relying on the *Lochner*-era precedent of *F. S. Royster Guano Co. v. Virginia*,[60] the Court further opined that even on the minimum standard of review, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .' "[61]

At the time, it was unclear whether the Court's turn in *Reed* and the other sex and illegitimacy cases[62] should be understood as extending

57. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 537–44. Interestingly, these developments in the Supreme Court were driven at least in part by protected class rational basis review arguments themselves in the late 1960s and early 1970s. In particular, statutes and state policies discriminating on the basis of illegitimacy—which were in many circumstances arguably motivated by civil rights backlash and efforts to subordinate African Americans—were challenged by a number of litigators both as being racially discriminatory (and sometimes also discriminatory against women) as well as failing rational basis review. *See, e.g.*, Brief *Amicus Curiae* for the NAACP Legal Defense and Educational Fund, Inc. & the National Office for the Rights of the Indigent at 13, Levy v. Louisiana, 391 U.S. 68 (1968) (No. 508) (making the race discrimination argument, and also arguing that there were "no rational reasons in favor of discriminating against illegitimates under the Louisiana statute"). *See generally infra* Section III.B (discussing several cases of this kind). Although advocates' race discrimination arguments would generally drop out of the cases by the time they were decided by the Supreme Court, some of the illegitimacy cases in which advocates raised rational basis racial justice arguments ultimately generated meaningful precedents that later provided the basis for further development of protected class rational basis arguments in the lower courts. *See generally* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015) (discussing extensively advocates' race discrimination claims in the early illegitimacy cases). There are also reasons to believe that traditions of robust rational basis review by administrators at the U.S. Department of Health, Education, and Welfare ("HEW")—which had been spread to poverty litigators by the 1960s—played a role in reviving notions of robust rational basis review in the late 1960s. *See generally* Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015) (describing the history of administrative equal protection at HEW, and how it spread to poverty litigators, influencing doctrinal arguments in the late 1960s).

58. 404 U.S. 71 (1971).

59. *Id.* at 76.

60. 253 U.S. 412 (1920).

61. *Reed*, 404 U.S. at 76 (quoting *Royster*, 253 U.S. at 415).

62. In addition to *Reed*, there were a significant number of other sex and illegitimacy cases decided by the Court on rational basis review during this era. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 13–17 (1975) (sex); Weinberger v. Wiesenfeld, 420 U.S. 636, 642–45 (1975) (sex); Jimenez v. Weinberger, 417 U.S. 628, 631–34 (1974) (illegitimacy); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172–76 (1972) (illegitimacy); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 74–76 (1968) (illegitimacy); Levy v. Louisiana, 391 U.S. 68, 70–72 (1968) (illegitimacy).

broadly to all classifications subject to minimum tier review,[63] or whether it should instead be understood as marking a special disfavor for sex and illegitimacy discrimination.[64] But as the number of cases in which the Court declined to situate its sex and illegitimacy precedents as a form of heightened scrutiny grew, the lower courts increasingly read *Reed* and the other sex and illegitimacy cases broadly, as mandating a meaningful form of review for all minimum tier cases.[65] Thus, across a host of contexts during the 1970s—including those lacking any direct relationship to sex or illegitimacy discrimination—the lower courts endorsed meaningful forms of rational basis review.[66]

The advent of these more meaningful forms of rational basis review—outside of the sex and illegitimacy context—generated intense controversy within the Court.[67] While many of the Justices supported more robust forms of rational basis review generally (not just as applied to sex and illegitimacy), some did not.[68] And, even among those who favored the across-the-board application of more meaningful standards for rational basis review, there were deep divisions regarding what, exactly, such review should entail.[69] Ultimately, these divisions would

63. Because the Court has used varying formulations of the standards it applies to cases not subject to formally heightened scrutiny, I consider the term "minimum scrutiny test" borrowed from Justice Rehnquist, to be a more accurate descriptive term than "rational basis review." *See, e.g.*, Memorandum from Justice William H. Rehnquist to Justice Lewis F. Powell, Jr., *supra* note 24, at 5 (using the term "minimum scrutiny test" rather than "rational basis review"). I nevertheless also use the more familiar term "rational basis review" herein. References to the two are used interchangeably throughout this Article.

64. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 537–44; *The Supreme Court, 1972 Term—Sex Discrimination by Federal Government in Payment of Fringe Benefits to Armed Services Personnel*, 87 HARV. L. REV. 116, 123 n.43 (1973) (noting that *Reed* appeared to reveal a "special sensitivity to sex classifications").

65. *See, e.g.*, Robison v. Johnson, 352 F. Supp. 848, 856–57 (D. Mass. 1973) (applying *Reed* and *Weber* as the applicable standard in an equal protection case involving military veterans), *rev'd*, 415 U.S. 361 (1974); *see also* Eyer, *Constitutional Crossroads*, *supra* note 1, at 539–40, 564 n.140. As I discuss elsewhere, it is unsurprising that most courts at the front end of constitutional equality change are unwilling to make the type of global pronouncements demanded by heightened scrutiny approaches. *See generally* Eyer, *The Canon*, *supra* note 1 (noting that courts share the social context that generates discriminatory laws, and thus may be predictably reluctant to make global assessments regarding the invidiousness of laws targeting a group at the front end of constitutional change).

66. *See, e.g.*, *Robison*, 352 F. Supp. at 856–57; *see also* Eyer, *Constitutional Crossroads*, *supra* note 1, at 564 n.140 (noting that *Reed* was cited outside of the sex discrimination context sixty-eight times during the two-year period from 1974–1975, and that in forty of those cases the litigant prevailed).

67. *See infra* notes 68–71 and accompanying text.

68. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 544–54 (describing the perspectives of the various Justices, as revealed by the debates in *Murgia*); Maltz, *supra* note 52, at 266–76 (same).

69. *See* Maltz, *supra* note 52, at 266–76.

preclude the Justices from forming a majority for any systematized or formalized statement of its rational basis case law, despite at least one major internal attempt to do so.[70] As such, into the 1980s, the Court would continue to apply varying standards in its rational basis case law, without formally explaining the metrics by which such cases were decided.[71]

Although the Court itself never resolved the disputes over the proper formulation of the rational basis standard raised by its early 1970s rational basis cases, other events ultimately pushed the lower courts and litigants away from more robust formulations of rational basis review. Thus, as sex and illegitimacy gradually came to be canonized as "quasi-suspect classifications," demanding formally heightened review, academics and others began to reimagine the early sex and illegitimacy cases as outside the canon of rational basis review.[72] As such, important cases such as *Reed* and *Weber*[73]—decided under the Court's minimum tier of scrutiny—came to be reconceptualized as "[h]eightened scrutiny under a deferential, old equal protection guise[,]"

70. *See id.* As described at length in both Maltz and Eyer, the case of *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam)—although finally decided by a bland per curiam opinion—was actually the site of a major (ultimately unsuccessful) effort on the part of the Justices to resolve their disputes over whether the rational basis standard should generally be applied more meaningfully, and if so, what the contours of that analysis should look like, *see id.* at 314–17; Eyer, *Constitutional Crossroads*, *supra* note 1, at 544–54; Maltz, *supra* note 52, at 266–76.

71. *See* Maltz, *supra* note 52, at 282 ("[B]y the late 1980s, the Justices had abandoned the effort to bring consistency and coherence to the Court's rational basis jurisprudence. Instead, even Justice Rehnquist had at least implicitly accepted the idea that rational basis analysis could be used as a kind of doctrinal safety valve that would allow the Justices to on occasion strike down classifications that they found particularly offensive . . . . [T]his use of the rational basis test remains a staple of the Court's equal protection jurisprudence to this day.").

72. *See, e.g.*, Eyer, *Constitutional Crossroads*, *supra* note 1, at 554–64, 573–74; *see also, e.g.*, Appellees' Brief on the Merits, Plyler v. Doe, 457 U.S. 202 (1982) (No. 80-1538), 1981 WL 389636, at *51 (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), as a heightened scrutiny case); Brief for Amicus Curiae National Organization for Women, Rostker v. Goldberg, 453 U.S. 57 (1981) (No. 80-251), 1981 WL 390369, at *4 (citing Reed v. Reed, 404 U.S. 71 (1971), in the context of arguing that heightened scrutiny applies to sex discrimination); Brief of the ACLU & the ACLU of Northern California, in Support of Petitioner, Amici Curiae, Michael M. v. Superior Court, 450 U.S. 464 (1981) (No. 79-1344), 1980 WL 339750, at *6 (citing Reed v. Reed, 404 U.S. 71 (1971), as authority for the proposition that sex discrimination is subject to heightened scrutiny). *See generally infra* note 74 (collecting casebooks that today identify *Reed* and *Weber* as only "purporting" to apply rational basis review). Note that contrary to the standard account, the canonization of sex and illegitimacy as subject to formally heightened scrutiny (both in the case law and in academia) was a gradual process, which took place over a period of years in the late 1970s and early 1980s. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 554–64.

73. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

and thus irrelevant to contemporary rational basis standards.[74] And so, stripped of its most meaningful precedents, rational basis review drifted away from the more robust formulations that had often characterized its application in the 1970s—toward more deferential forms of review.[75]

Today, there are again pressures that are pushing courts and litigants to take seriously the application of meaningful standards under the minimum tier of equal protection review. Just as in the 1970s, when the Court's early sex and illegitimacy cases pushed the courts and litigants toward robust forms of rational basis review, the success of the LGBT rights movement's equal protection claims are working to expand conceptions of what minimum tier review entails today.[76] Thus, as the Court has consistently declined to canonize its LGBT rights cases as "heightened scrutiny" cases, it has again opened space for litigants, lower courts, and scholars to take seriously the possibility that equal protection—even outside of its formally heightened tiers—demands meaningful review.[77]

These revitalized approaches to rational basis review have not been restricted to any one doctrinal approach. Thus, while discussions of "animus" and a special "rational basis with bite" standard have dominated scholarly descriptions of the LGBT rights cases' connection

74. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 683–84 (13th ed. 1997) (first alteration in original). In the modern era, most casebooks do not describe *Weber* and *Reed* as true rational basis cases, typically characterizing them as only "purporting" to apply rational basis review, or otherwise suggesting that they are outside the Court's canonical rational basis doctrine. *See, e.g.*, WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 690 (Robert C. Clark et al. eds., 11th ed. 2012); STONE ET AL., *supra* note 24, at 637, 717; SULLIVAN & FELDMAN, *supra* note 15, at 712; *see also* Eyer, *The Canon*, *supra* note 1, at 18 n.80, 19 n.95 (collecting casebooks).

75. *See*, *e.g.*, Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004); EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 52–53 (1999); Eyer, *Constitutional Crossroads*, *supra* note 1, at 554–64. Note that although the courts moved toward more deferential formulations of rational basis review during this era, there remained sufficient uncertainty and ambiguity in the doctrine for social movements to, at times, continue to be able to make use of rational basis review to generate initial constitutional change. *See generally* Eyer, *The Canon*, *supra* note 1 (describing a variety of ways that social movements have made use of rational basis review to open up space for constitutional change during all eras of modern constitutional history).

76. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 565–76; *see also* cases cited *supra* note 31; cases cited *infra* note 438.

77. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 565–76; *see also, e.g.*, Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1067 (9th Cir. 2014) (relying in part on *Romer* in invalidating law discriminating against Deferred Action for Childhood Arrivals ("DACA") recipients on rational basis review), *petition for cert. filed*, No. 16-1180 (U.S. Mar. 31, 2017); Mason v. Granholm, No. 05-73943, 2007 WL 201008, at *3–4 (E.D. Mich. Jan. 23, 2007) (relying on *Romer* to invalidate law that discriminated against prisoners on rational basis review). *See generally* cases cited *supra* note 31 and accompanying text.

with rational basis review,[78] in fact the cases themselves—and the lower courts' application of them—have, as in the 1970s, applied a variety of diverse, often diffuse and poorly defined approaches to robust rational basis scrutiny.[79] While some scholars have understandably criticized this aspect of the Court's decisions (i.e., their lack of a clearly defined doctrinal framework), it also means that the potential of those decisions has few obviously delineated bounds.[80] As such, the contemporary moment of expanding minimum tier review offers much uncertainty, but also many potential opportunities for those who might seek to effectuate equality goals via rational basis review.

As the history set out in the following Parts demonstrates, these opportunities are not limited to those outside the protected classes.[81] Rather, those today *within* the protected classes—such as racial minorities and women—may also benefit in substantial ways from expanded conceptions of what rational basis review entails. Indeed, as the rise of protected class rational basis review in the 1970s illustrates, courts' adoption of meaningful minimum tier review can substantially sidestep otherwise vexing questions regarding the limits of what race or sex discrimination "is."[82]

II. RACIAL JUSTICE AND THE ROLE OF RATIONAL BASIS REVIEW IN BOUNDARY DISPUTES IN THE 1970S

Today, racial justice claims under the Constitution are often thought of as inextricably intertwined with strict scrutiny.[83] In this conception, strict scrutiny represents the standard applicable to all constitutional race discrimination claims, and thus the limits of where

78. *See, e.g.*, Yoshino, *supra* note 54, at 759–60; *see also* Eyer, *The Canon*, *supra* note 1, at 37–38 (describing the tendency of the canon to focus on specific theories of "rational basis with bite" and "animus" as the exclusive explanations for meaningful rational basis review, including, *inter alia*, the LGBT rights cases).

79. *See* cases cited *supra* note 31; cases cited *infra* note 438; *see also* Bambauer & Massaro, *supra* note 29, at 302 ("The decisions overturning laws that discriminate on the basis of sexual orientation are analytically fuzzy."); Eyer, *The Canon*, *supra* note 1, at 567–80 (exploring this issue in depth). *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013) (invalidating law without relying on formally heightened scrutiny—utilizing complex reasoning and not clearly defining its doctrinal approach); Romer v. Evans, 517 U.S. 620 (1996) (same).

80. *See, e.g.*, Steve Sanders, *Mini-Domas as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 13 (2014) (noting that all of the LGBT rights cases have "suffered criticism for their ambiguous levels of scrutiny and lack of doctrinal rigor").

81. *See infra* Parts II–III.

82. *See infra* Parts II–III.

83. *See supra* notes 15–19 and accompanying text.

strict scrutiny is applied demarcate the outer boundaries of such claims.[84] But in fact, ever since the initial rise of the tiered system of equal protection review, racial justice advocates have also harnessed rational basis arguments to make racial justice claims.[85] Thus, just as Serena Mayeri has observed in other contexts, it is the Supreme Court's choice of which arguments to take up, rather than the arguments themselves, that have largely defined our conception of the scope of equal protection advocacy.[86]

In the late 1960s and early 1970s, such arguments were often successful and permitted both racial justice advocates and many judges to sidestep what were then burgeoning disputes over the boundaries of constitutional race discrimination.[87] Thus, rational basis arguments served as a means of avoiding entirely what became one of the central racial justice disputes of the 1970s—whether race discrimination claims required proof of intentional discrimination.[88] This Part discusses these early rational basis claims by racial justice plaintiffs, as well as how the Supreme Court's refusal to engage with such "protected class rational basis" claims in *Washington v. Davis* has made their legacy largely invisible.

A. The Rise of Rational Basis Racial Justice Arguments in the Lower Courts (1968–1976)

In the aftermath of *Brown v. Board of Education*,[89] it remained uncertain what form the "new equal protection" would take.[90] Although

84. *See supra* notes 15–19 and accompanying text.

85. *See, e.g.*, *infra* note 93 and accompanying text.

86. *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 227–33 (2011) (making a similar observation in the context of an exploration of the nuanced claims made by the women's rights movement, which were not nearly as unidimensional as the Court's ultimate opinions); Mayeri, *supra* note 57, at 1280–81 (describing the race and gender equality arguments that were raised in the early illegitimacy cases and the way that they were ignored at the Supreme Court level, and thus have been largely forgotten).

87. *See infra* Section II.A. Throughout this Article, the term "boundary disputes" is used to refer to disputes about the boundaries of what can be considered constitutional race (or sex) discrimination. Disputes over whether disparate impact discrimination can be conceptualized as a form of constitutional race discrimination are a classic example of such boundary disputes.

88. *See generally* Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1 (2016) (including extended discussion of the complicated and central role that disputes over the significance of intent in equal protection doctrine played in 1960s- and 1970s-era race discrimination jurisprudence); *infra* Sections II.A, II.B (describing how rational basis review afforded an opportunity to sidestep the burgeoning issue of whether intent was required to prove race discrimination).

89. 349 U.S. 294 (1955).

it was clear that "separate but equal" was no longer the generally governing rule, the *Brown* opinion itself did not define the contours of what doctrinal regime would take its place.[91] But by the late 1960s, the Court had coalesced around a two-tier approach to equal protection, under which suspect classes (such as race) and fundamental rights (such as the right to marry) received strict scrutiny—and other forms of government action were subject to rational basis (minimum tier) review.[92]

In this new equal protection environment, the NAACP Legal Defense Fund ("LDF") and other civil rights groups embraced not only the use of heightened scrutiny arguments, but also rational basis review.[93] Thus, across a host of cases in the late 1960s and 1970s, racial

90. *See* Gunther, *supra* note 13, at 8 (using this term to describe developments in equal protection doctrine under the Warren Court); *cf.* Yoshino, *supra* note 54, at 750 (using this term to refer to the contemporary Court's approach to reaching equality goals).

91. *Brown*, 349 U.S. at 298–301; *see, e.g.*, Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 235–39 (1991); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1478–89 (2004); *cf.* Eyer, *supra*, note 88, at 8–22 (noting that even prior to *Brown*, the Court precluded formal racial discrimination vis-à-vis voting and jury service rights, and thus had developed a set of sub-constitutional doctrines for addressing formal equality challenges, many of which initially carried over to the post-*Brown* era).

92. Gunther, *supra* note 13, at 8 (describing the Warren Court's two-tier approach); *see* Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (declaring that race classifications were subject to strict scrutiny and that that right to marry was fundamental).

93. *See* Motion for Leave to File Brief for the Urban Coalition et al. as Amici Curiae at 9–16, McInnis v. Ogilvie, 394 U.S. 322 (1969) (No. 1033) (on file with George Washington University Libraries in NEA Archives, Series 1, Box 1421, Folder 20) (making, *inter alia*, a rational basis argument for equal school funding across districts); Brief for Appellant at 66–67, Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir. 1977) (No. 75-2321), *repudiated by* Thomas v. Shipka, 818 F.2d 496, 501 (1987) (on file with Princeton University Seeley G. Mudd Manuscript Library in ACLU Collection, Box 3154) (making the rational basis argument in the context of a police violence case); Brief *Amicus Curiae* for National Education Association at 74, United States v. Georgia, 445 F.2d 303 (5th Cir. 1971) (No. 30,338) (on file with George Washington University Libraries in NEA Archives, Series 17, Box 2997) (arguing in a teacher desegregation case that the Fourteenth Amendment "imposes upon school districts the requirement of employing reasonable and non-discriminatory standards and procedures in hiring and promoting teachers[,]" and citing, *inter alia*, rational basis cases); Brief of the NAACP as *Amicus Curiae* at 15–18, 34–35, Hansen v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (No. 21,167, 21,168) (on file with the Library of Congress in NAACP Collection, Box V:341, Folder 7) (showing the NAACP arguing for an effects approach to heightened scrutiny, but also suggesting that the district's tracking system was unlawful as it failed rational basis review in its actual operation); Brief for Amicus Curiae: National Education Association at 4–15, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (Nos. 21,167, 21,168) (on file with the Library of Congress in NAACP Collection, Box V:341, Folder 6) (arguing that tracking system in Washington, D.C., must be invalidated because it was racially discriminatory, but also, independently because it was arbitrary in its implementation); Brief for the N.E.A. Commission on Professional Rights & Responsibilities, Amici Curiae at 12–17, Henry v. Coahoma Cty. Bd. of Educ., 353 F.2d 648 (5th Cir. 1965) (No. 21,438) (on file with George Washington University Libraries in NEA Archives, NEA1006.RG, Box 2997)

justice plaintiffs contended that—even if the circumstances did not render the application of strict scrutiny appropriate—the relevant government action failed rational basis review.[94] As government action increasingly presented "second generation" racial justice issues (such as whether government actions having a disparate racial impact were actionable), this approach allowed racial justice organizations to sidestep disputes over the boundaries of what forms of race discrimination were actionable—by arguing that the relevant government action failed even minimum standards of review.[95]

Rational basis arguments were typically not the frontline argument of racial justice organizations.[96] But by the early 1970s, as racial justice

(making argument that teacher's dismissal was racially discriminatory, but also arguing that any teacher dismissal that is arbitrary or capricious violates substantive due process); *infra* notes 260, 327 and accompanying text (discussing in-depth several of the relevant cases).

94. *See, e.g.*, Andrews v. Drew Mun. Separate Sch. Dist., 507 F.2d 611, 613–17 (5th Cir. 1975) (employment of unwed mothers); United States v. Chesterfield Cty. Sch. Dist., 484 F.2d 70, 74–75 (4th Cir. 1973) (testing in employment); Armstead v. Starkville Mun. Separate Sch. Dist., 461 F.2d 276, 279–80 (5th Cir. 1972) (testing in employment); Chance v. Bd. of Exam'rs, 458 F.2d 1167, 1177–78 (2d Cir. 1972) (testing in employment); Ga. Ass'n of Educators v. Nix, 407 F. Supp. 1102, 1107–11 (N.D. Ga. 1976) (testing in employment); United States v. North Carolina, 400 F. Supp. 343, 349–51 (E.D.N.C. 1975) (testing in employment), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977); Butts v. Nichols, 381 F. Supp. 573, 579–82 (S.D. Iowa 1974) (criminal records discrimination in employment); Arrington v. Mass. Bay Transp. Auth., 306 F. Supp. 1355, 1358–59 (D. Mass. 1969) (testing in employment); Smith v. King, 277 F. Supp 31, 38–41 (M.D. Ala. 1967) (qualification for benefits where applicant had nonmarital relationship), *aff'd on other grounds*, 392 U.S. 309 (1968); Hobson v. Hansen, 269 F. Supp. 401, 511–14 (D.D.C. 1967) (tracking in education), *aff'd on other grounds*, 408 F.2d 175 (D.C. Cir. 1969); *see also* United States v. Nansemond Cty. Sch. Bd., 351 F. Supp. 196, 202–08 (E.D. Va. 1972) (applying standards on rational basis review like those used in Griggs v. Duke Power Co., 401 U.S. 424 (1971), in the context of testing in employment, but ultimately denying relief), *rev'd*, 492 F.2d 919 (4th Cir. 1974).

95. *See* sources cited *supra* note 93. As Reva Siegel has shown, lower courts also during this era blurred the boundaries between intent and impact as ways of demonstrating discrimination—concepts that later were very clearly demarcated by the Supreme Court (with intent being the showing demanded to trigger strict scrutiny). *See* Siegel, *supra* note 29, at 14–20. The cases described herein typically used rational basis review as a way of sidestepping altogether the question of whether more impact-oriented forms of discrimination were sufficient to trigger heightened scrutiny under the equal protection clause, although they sometimes did use racial impact as a trigger for more meaningful rational basis review (much as, for example, today, many scholars conceive of animus as a trigger for "rational basis with bite"). *See* cases cited *supra* note 94. *See generally* Part II (describing the role of rational basis review in racial justice claims in the 1970s). This specific version of "protected class rational basis review" would arguably be problematic today under *Washington v. Davis*, *see infra* Section III.B, but the approach taken by other courts—simply applying a generally meaningful form of rational basis review (which they understood to extend to *all* contexts, not simply to depend on a racial-impact trigger)—is not, *see, e.g.*, cases cited *supra* note 94; cases cited *infra* notes 260, 327 and accompanying text.

96. Typically, rational basis arguments were presented as a fallback argument to arguing for some kind of heightened scrutiny, although they also sometimes were made by racial

litigation pushed into new domains, they increasingly gained credence in the lower courts.[97] Thus, across a host of contexts, courts found that regardless of whether a racially disparate impact was sufficient, standing alone, to trigger strict scrutiny, some showing of rationality was, at a minimum, required.[98] And, finding such a rational basis to be lacking, a variety of courts held, in turn, that racially burdensome government action was invalid on rational basis review—across contexts as diverse as testing regimes, criminal records discrimination, educational tracking systems, and welfare requirements.[99]

The case of *Chance v. Board of Examiners*,[100] brought by the NAACP LDF in September of 1970, was emblematic of this approach.[101] Following years of increasing unrest over the small proportion of black and Latino principals in the New York City school system,[102] the LDF took on *Chance* as one of a series of cases it brought in the late 1960s and early 1970s challenging employment testing and seniority regimes in both the private and public sectors.[103] As it did in many such cases, the LDF contended that the test for qualifying supervisors was both discriminatory—having a disparate impact on blacks and Latinos—and unrelated to the capability to perform the job of principal, representing an arbitrary barrier to blacks' and Latinos' advancement.[104]

justice organizations as their primary argument. *See supra* note 93 (citing briefs); *infra* notes 104, 147 (same).

97. *See* cases cited *supra* note 94.

98. *See* cases cited *supra* note 94.

99. *See* cases cited *supra* note 94.

100. 458 F.2d 1167 (2d Cir. 1972).

101. *Id.* at 1177–78.

102. *See* CHRISTINA COLLINS, "ETHNICALLY QUALIFIED": RACE, MERIT, AND THE SELECTION OF URBAN TEACHERS, 1920–1980, at 148–50 (2011).

103. *See Chance*, 458 F.2d at 1168, 1170. The most famous of such cases is, of course, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which would ultimately establish the disparate impact principle under Title VII. *See id.* at 429–36. For a discussion of the LDF's role in early disparate impact arguments, including in *Griggs*, see, for example, JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 444–52 (rev. ed. 2004); Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 288–93 (2011); David J. Garrow, *Toward a Definitive History of* Griggs v. Duke Power Co., 67 VAND. L. REV. 197, 205–30 (2014).

104. *See, e.g.*, Brief for Plaintiffs-Appellees at 21–46, *Chance*, 458 F.2d 1167 (No. 71-2021) (on file with the National Archives at New York City) [hereinafter *Chance* NAACP Brief]. These arguments—and the protected class rational basis review arguments made in a number of other cases during this era—bore significant similarities to the statutory disparate impact standard under Title VII. *Id.*; *see also* sources cited *supra* note 93. However, plaintiffs also made—and courts embraced—a wide variety of other rational basis arguments in the context of racially and gender impactful laws during this era as well. *See* sources cited *supra* notes 93–94. Even in the context of *Chance* itself, the Second Circuit would ultimately conclude that it did not need to address the issue of whether a disparate impact might trigger more meaningful

Following extensive expert discovery, the district court, on July 14, 1971, agreed, granting the plaintiffs' motion for a preliminary injunction.[105] Noting that the "examinations . . . have the *de facto* effect of discriminating . . . against qualified Black and Puerto Rican applicants[,]" the court observed that "the existence of such discrimination, standing alone, would not necessarily entitle plaintiffs to relief."[106] But, the court further held that where "the examinations result in *substantial* discrimination against a minority racial group qualified to take them, a strong showing must be made by the Board that the examinations are required to measure abilities essential to performance of the supervisory positions for which they are given"; a showing the Board of Examiners had not made.[107] Thus, although nominally eschewing Title VII precedents, the district court imposed a standard very similar to that recently adopted in the Title VII context in *Griggs v. Duke Power Co.*[108]

On appeal to the Second Circuit, the assigned panel immediately recognized the importance of the case.[109] Seven groups of outside entities or individuals had requested leave to participate as amici, offering a diversity of strongly polarized views of whether the Constitution required—or, conversely, permitted—the type of approach that the district court had endorsed.[110] Foreshadowing the divisions that

scrutiny, as the test "failed to meet . . . the rational relationship standard[.]" *See Chance*, 458 F.2d at 1177–78.

105. *See* Chance v. Bd. of Exam'rs, 330 F. Supp. 203, 224 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

106. *Id.* at 214.

107. *Id.* at 216, 223. As noted, *infra* note 108 and accompanying text, this ambiguous standard most closely resembles the *Griggs* standard (rather than either of the two potentially applicable constitutional standards—rational basis and strict scrutiny), although the district court denied adopting the Title VII approach. *Id.* at 215.

108. 401 U.S. 424, 429–36 (1971) (imposing in the Title VII context requirements that employers demonstrate the job-relatedness of any employment qualifications having a disparate racial impact, regardless of discriminatory intent).

109. *See* Memorandum of Judge William H. Timbers, U.S. Court of Appeals for the Second Circuit, to Judge Wilfred Feinberg, U.S. Court of Appeals for the Second Circuit, and Judge Roszel C. Thomsen, U.S. Dist. Court for the Dist. of Md., re: Chance v. Bd. of Exam'rs, No. 71-2021, at 1 (Feb. 17, 1972) (on file with Columbia University, Rare Book & Manuscript Library, Wilfred Feinberg Collection, Box 32) (noting that the case would likely have "precedential effect throughout the Country").

110. *See* Brief Amicus Curiae of Anti-Defamation League of B'nai Brith et al. at 7–24, *Chance*, 458 F.2d 1167 (No. 71-2021) (on file with the National Archives at New York City); Brief Amicus Curiae of Aspira of America, Inc. at 4–16, *Chance*, 458 F.2d 1167 (No. 71-2021) (on file with the National Archives at New York City); Brief of Charles Wiener (pro se) as Amicus Curiae at 8–42, Ex. 1, *Chance*, 458 F.2d 1167 (No. 71-2021) (on file with the National Archives at New York City) [hereinafter *Chance* Brief of Charles Wiener (pro se) as Amicus Curiae]; Brief for the New York Association of Black Educators as Amicus Curiae at 11–37, Chance v. Bd. of Exam'rs, 458 F.2d 1167 (2d Cir. 1972) (No. 71-2021) (on file with the

would later erupt publicly over affirmative action, *Chance* divided the traditional liberal coalition, with black and Latino organizations supporting the plaintiffs, and labor and Jewish organizations arguing that the district court's decision privileged race over a fair and reasonable merit-based regime.[111]

In their briefing, the defendants argued that numerous aspects of the district court's reasoning—from its finding of a disparate impact to its conclusion that the exam was not job-related—were erroneous.[112] But among their principal arguments was that the district court had—regardless of racial impact—applied the wrong standard of review.[113] Noting that "it is inevitable that various state imposed classifications will have a varying impact on different racial groups[,]" defendants argued that "[u]nless the state draws [purposeful] distinctions on the basis of race, the Federal court's role is restricted to 'declaring whether there is a reasonable basis for the classification . . . .' "[114]

In response, the LDF contended that the defendants erroneously sought to distinguish between purposeful discrimination and disparate impact, and that "the interests of those discriminated against are essentially the same and deserve the same degree of protection whether employment opportunities are denied explicitly and intentionally or inadvertently."[115] But they also strongly argued that "even if the rational relationship test . . . is applied, the decision below must be upheld."[116] Noting that "[t]he court below rested its decision on findings that the Examiners could demonstrate no relationship between their tests and

National Archives at New York City); Brief of the Public Education Association (PEA) as Amicus Curiae at 6–29, *Chance*, 458 F.2d 1167 (No. 71-2021) (on file with the National Archives at New York City); Brief of the United Federation of Teachers et al., Amicus Curiae at 11–35, *Chance*, 458 F.2d 1167 (No. 71-2021) (on file with the National Archives at New York City).

111. *See* sources cited *supra* note 110; *see also* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT 172 (2014) (noting that the summer of 1972 is when divisions among the liberal coalition over affirmative action "cracked wide"). *See generally* DENNIS DESLIPPE, PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION (2012) (documenting extensively the ways that affirmative action later divided labor and Jewish organizations from other parts of the liberal coalition).

112. Brief for Defendant-Appellant: Board of Examiners at 7, 26, *Chance*, 458 F.2d 1167 (No. 71-2021) (on file with the National Archives at New York City).

113. *Id.* at 36–41.

114. *Id.* at 39–40 (quoting Johnson v. N.Y. State Educ. Dep't, 449 F.2d 871, 876 (2d Cir. 1971)).

115. *Chance* NAACP Brief, *supra* note 104, at 34–35.

116. *Id.* at 46.

the purpose for which they were used," the LDF argued that, regardless of the standard of review, the plaintiffs must prevail.[117]

Judge Wilfred Feinberg, assigned to write the majority opinion, viewed the matter as "not an easy case[.]"[118] One of the white candidates who had passed the exam—only to see exam-based promotions suspended after the district court's injunction—participated in the case as an amicus, and had made clear to Judge Feinberg and his colleagues that "[w]e are dealing not with abstractions but with people . . . ."[119] Detailing the long efforts he had made to pass the examination, the teacher, Charles Wiener, argued that the district court's ruling represented nothing less than the ultimate "culminat[ion]" of "a constant erosion of the merit system . . . ."[120]

But while sympathetic to Wiener, Judge Feinberg and his colleagues would see things very differently. Agreeing with plaintiffs that the district court had appropriately found that the test was not "job-related," the opinion for the Second Circuit stated that such examinations were thus "wholly irrelevant to the achievement of a valid state objective."[121] As such, the panel concluded that it was "unnecessary to reach [the] most difficult question" of whether heightened scrutiny was applicable to de facto discrimination.[122] Because the defendant "failed to meet its burden even under the rational relationship standard, which would be the least justification that the Constitution requires[,]" no further inquiry was required.[123] Thus, the court rejected the notion that the test marked an indicator of merit, finding instead that it constituted an arbitrary barrier to minority advancement.[124]

While the LDF was bringing *Chance* and cases like it across the country, the National Education Association ("NEA")—one of the leading national teachers' unions—was bringing a similar set of challenges to workplace examinations on behalf of black teachers in the South.[125] Although once a segregated association that initially declined

117. *Id.* at 45.

118. Interview by Jeffrey Morris with Wilfred Feinberg, Judge, U.S. Court of Appeals for the Second Circuit 252 (Dec. 20, 1996) (transcript on file with Columbia University, Rare Book & Manuscript Library, Wilfred Feinberg Collection, Box 205).

119. *Id.*

120. *Chance* Brief of Charles Wiener (pro se) as Amicus Curiae, *supra* note 110, at 27.

121. Chance v. Bd. of Exam'rs, 458 F.2d 1167, 1175, 1177 (2d Cir. 1972) (quoting Turner v. Fouche, 396 U.S. 346, 362 (1970)).

122. *Id*. In relation to this issue, the Court—perhaps less than candidly—contended that the district court had in fact applied rational basis review. *Id.*

123. *Id*. at 1178.

124. *See id.*

125. The LDF was actively involved in disparate impact litigation around the country at this time. *See supra* note 103 and accompanying text. But they were counsel in only one of the

to endorse *Brown*, by the early 1960s, the NEA was increasingly working to achieve teacher desegregation.[126] By the mid-1960s, the NEA had become deeply concerned about the "displacement" of black teachers as a result of desegregation, and began a series of investigations in the South to determine the scope of the problem.[127] Ultimately, the NEA would hire former U.S. Department of Justice Civil Rights Division head Stephen Pollak[128] to bring a series of lawsuits challenging

National Teacher's Exam ("NTE") cases. *See* Walston v. Cty. Sch. Bd. of Nansemond Cty., 492 F.2d 919, 920 (4th Cir. 1974); *infra* note 129. Most of the cases were spearheaded by the NEA, the Civil Rights Division of the Department of Justice ("CRD"), or both. *See* cases cited *infra* note 129; *see also* Scott Baker, *An American Dilemma: Teacher Testing and School Desegregation in the South in* ESSAYS IN TWENTIETH-CENTURY SOUTHERN EDUCATION: EXCEPTIONALISM AND ITS LIMITS 163, 183 (Wayne J. Urban ed., 1999) (quoting the NAACP's Jack Greenberg as stating that "the problem [of teacher terminations incident to desegregation] was more widespread than we could handle").

126. *See, e.g.*, NAT'L EDUC. ASS'N OF THE U.S., RECENT HISTORY AND PRESENT STATUS OF NEA POLICY AND PROGRAM AS RELATED TO THE EDUCATIONAL PHASES OF CIVIL RIGHTS 1 (1965) (on file with George Washington University Libraries in NEA Archives, Box 2185, Folder 7); *The Record Shows NEA Is Leader in Fighting Discrimination in U.S.*, DETROIT EDUC. NEWS, Oct. 23, 1963, at 3 (on file with George Washington University Libraries in NEA Archives, 1006.RG, Box 2997); *see also* LEE, *supra* note 111, at 226 (describing the early history of the NEA as a segregated union that did not endorse *Brown* until 1961).

127. Extensive archival documents make clear the NEA's concerns over the problem of the displacement of black teachers incident to desegregation, as well as, particularly, the use of the NTE in discriminatory ways. *See generally, e.g.*, George D. Fischer, President, Nat'l Educ. Ass'n, Statement Before the Senate Select Committee on Equal Educational Opportunity (June 16, 1970) (on file with George Washington University Libraries in NEA Archives, MS 2766, Series 2, Subseries 2, Box 916) (testifying to the NEA's findings on discriminatory treatment of black teachers in the post-desegregation South as well as the discriminatory use of the NTE); NAT'L EDUC. ASS'N OF THE U.S., REPORT OF TASK FORCE SURVEY OF TEACHER DISPLACEMENT IN SEVENTEEN STATES (1965) (on file with George Washington University Libraries in NEA Archives, Series 17, Box 2997) (documenting extensively the displacement of and discrimination against black teachers incident to desegregation); NAT'L EDUC. ASS'N OF THE U.S., REPORT OF THE NEA TASK FORCE ON SCHOOL DESEGREGATION: LOUISIANA AND MISSISSIPPI (1970) (on file with George Washington University Libraries in NEA Archives, Box 931, Folder 1) (documenting extensively the NEA's investigation of desegregation issues, including teacher displacement and the use of the NTE in Mississippi and Louisiana); Boyd Bosma, *Racial Discrimination Against Teachers*, 10 EQUITY & EXCELLENCE EDUC., Jan.–Feb. 1972, at 59 (describing the problem of discrimination against black teachers and problems with the NTE); Memorandum from Boyd Bosma, Assistant Dir. for Civil Liberties & Intergroup Relations, to Staff Ad Hoc Comm. on the Nat'l Teacher Examination re: Implementation of New Business Item Four 1 (Sept. 15, 1970) (on file with George Washington University Libraries in NEA Archives, Box 2658, Folder 1) (describing the NEA's concerns over the use of the NTE and proposing action).

128. Interview by Katia Garrett with Stephen J. Pollak, in Washington, D.C. (June 14, 2005), *in* STEPHEN J. POLLAK, ORAL HISTORY PROJECT: THE HISTORICAL SOCIETY OF THE DISTRICT OF COLUMBIA CIRCUIT 194, 200–07 (2014), http://dcchs.org/StephenJPollak/StephenJPollak_Complete.pdf [https://perma.cc/EMH8-AEAR].

the termination of African American teachers as a consequence of teacher desegregation.[129]

At the center of the controversy in many of the NEA cases was the use of the National Teacher's Exam ("NTE")[130] and other standardized tests as a basis for teacher qualifications or dismissals.[131] Southern states and school districts had originally, with the encouragement of the NTE's creator Ben Wood, turned to the adoption of the NTE to justify race-based pay differentials in the 1940s.[132] As courts finally began to order faculty desegregation in the late 1960s, many of those same states and school districts also turned to the NTE as a basis for thinning the ranks of African American teachers.[133] Typically adopted directly after (or in anticipation of) teacher desegregation, and without validation of the cut-

129. For a sampling of the cases in which the NEA participated in relation to this issue, either as parties or as amici, see, for example, *Walston*, 492 F.2d at 920; United States v. Chesterfield Cty. Sch. Dist., 484 F.2d 70, 74 (4th Cir. 1973); Baker v. Columbus Mun. Separate Sch. Dist., 462 F.2d 1112, 1113 (5th Cir. 1972); Armstead v. Starkville Mun. Separate Sch. Dist., 461 F.2d 276, 277 (5th Cir. 1972); Carter v. W. Feliciana Parish Sch. Bd., 432 F.2d 875, 876 (5th Cir. 1970); United States v. South Carolina, 445 F. Supp. 1094, 1094 (D.S.C. 1977), *aff'd sub nom.* Nat'l Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978); United States v. North Carolina, 400 F. Supp. 343, 345 (E.D.N.C. 1975); *see also* Ga. Ass'n of Educators v. Nix, 407 F. Supp. 1102, 1102 (N.D. Ga. 1976) (NEA affiliate, unclear if NEA itself participated); National Education Association, Draft Testimony to Civil Rights Commission on Minimum Competency Testing 18, 22 (July 3, 1979) (on file with George Washington University Libraries in NEA Archives, Series 7, Subseries 6, Box 2185, Folder 16) (describing an early challenge brought in 1966 by the NEA's Florida affiliate to Florida's institutionalization of a standardized testing regime incident to teacher desegregation).

130. One of the prominent cases involved the use of the Graduate Record Exam ("GRE"), rather than the NTE. *Armstead*, 461 F.2d at 277–81. However, the legal principles involved in that case were essentially the same as in the other cases. Throughout, I refer to these cases generally as the "NTE cases."

131. *See generally* cases cited *supra* note 129 (listing cases challenging the use of the NTE—or occasionally another standardized test—as a condition of new or continued teacher employment). The NEA did not participate as a party in every one of the cases challenging the NTE, nor were those the only cases they filed or participated in as amici. The CRD was also actively involved in bringing NTE challenges, and NTE issues also arose in a number of existing desegregation cases. *See infra* notes 142, 148 and accompanying text (describing the CRD's participation in NTE cases); *see also Carter*, 432 F.2d at 875, 878 (involving an existing desegregation case in which the NTE issue was raised and NEA participated as amicus). The NEA itself was also involved in challenges to the non-hiring, dismissal, and demotion of African American teachers in the South that were not directly related to the NTE. *See, e.g.*, Lee v. Macon Cty. Bd. of Educ., 321 F. Supp. 1, 2–6 (N.D. Ala. 1971). However, the NEA was probably the leading entity involved in challenging the use of standardized testing in the post-desegregation South. *See* cases cited *supra* note 129.

132. *See* Baker, *supra* note 125, at 167–78 (explaining in detail the origins of the NTE); *see also* R. SCOTT BAKER, PARADOXES OF DESEGREGATION: AFRICAN AMERICAN STRUGGLES FOR EDUCATIONAL EQUITY IN CHARLESTON, SOUTH CAROLINA, 1926–1972, at 44–62 (2006) (same).

133. *See* Baker, *supra* note 125, at 178–90 (explaining how the NTE was used as a legally defensible way of preventing faculty desegregation); *see also* BAKER, *supra* note 132, at 173, 178–80 (same).

off score,[134] there was considerable reason to believe that many if not most of the southern states and school districts adopting the NTE during this time did so for reasons that were intentionally discriminatory.[135]

These uses of the NTE put the Educational Testing Service ("ETS"), the testing agency that assumed responsibility for the NTE in the 1950s, in a difficult position. While NTE proponents—including apparently ETS—had originally stoked racial fears in encouraging the southern states to adopt the NTE in the 1940s and 1950s,[136] ETS was aware by the 1970s that there were increasing legal challenges to the use of standardized testing, especially in the context of race.[137] The NEA itself was also putting increasing pressure on ETS to address racially discriminatory uses of the NTE, with at least some affiliates urging the organization to remove the test from the market altogether because of its widespread discriminatory use in the South.[138] Moreover, it appears that many of the staff responsible for the NTE at ETS in the early 1970s themselves harbored genuine concerns about ensuring the test's racially non-discriminatory use, leading the organization to adopt standards responsive to those concerns.[139]

134. In most instances, both the test itself and the relevant cutoff standards were adopted without any study of whether they bore any relationship to teacher quality. *See, e.g.*, Brief Amicus Curiae on Behalf of National Education Association & South Carolina Education Association at 9–17, United States v. Chesterfield Cty. Sch. Dist., 484 F.2d 70 (4th Cir. 1973) (No. 73-1141) [hereinafter *United States v. Chesterfield* Amicus Brief] (on file with Stephen Pollak). In contrast, the racial impact of such laws was often an explicit part of the discussion incident to their adoption. *See, e.g.*, Brief for Appellees at 40–44, *Armstead*, 461 F.2d 276 (No. 71-2124) (on file with Stephen Pollak) [hereinafter *Armstead* Brief for Appellees] (discussing the circumstances of the adoption of standardized testing measures in that case). *See generally* Baker, *supra* note 125 (discussing the history of the adoption of the NTE in the South at length).

135. *See* sources cited *supra* note 134; *see also* cases cited *supra* note 129 (citing NEA cases).

136. *See* sources cited *supra* notes 132–35.

137. *See, e.g.*, James R. Deneen, New Influences on Selection and Evaluation Processes, *in* DENEEN ET AL., EDUC. TESTING SERV., THE SELECTION AND EVALUATION OF TEACHERS 5, 5–6 (Oct. 19, 1971), http://files.eric.ed.gov/fulltext/ED073157.pdf [https://perma.cc/NKR9-BCN7] (presentations to the American Association of School Personnel Administrators); Thelma Spencer, *Use of Tests: Employment and Counseling* (Feb. 18–20, 1972), *in* STANDARDIZED TESTING ISSUES: TEACHERS' PERSPECTIVES 73, 74 (1977), https://ia600305.us.archive.org/23/items/ERIC_ED146233/ERIC_ED146233.pdf [https://perma.cc/V9R2-3TPT].

138. *See, e.g.*, Memorandum from Boyd Bosma to Samuel B. Ethridge et al. re: National Teacher Examinations 1 (Sept. 6, 1972) (on file with George Washington University Libraries in NEA Archives, Box 2658, Folder 1); Letter from Fred Husmann, Assistant Exec. Sec'y for Prof'l Dev., to Mr. James R. Deneen, 2 (July 20, 1972) (on file with George Washington University Libraries in NEA Archives, Box 2658, Folder 1).

139. Officials at ETS were concerned regarding inappropriate and discriminatory uses of the NTE as well as other standardized exams such as the GRE. *See, e.g.*, sources cited *supra* note 137; sources cited *infra* note 141; *see also* Interview by Katia Garrett with Stephen J.

As such, by the 1970s, ETS was taking a clear stand against unvalidated uses of the NTE (such as those in the post-desegregation South), and against any use of the test as the exclusive basis for teacher terminations.[140] Thus, ETS often joined the NEA—either as experts or amici—in litigation challenging the NTE; although the organization was also often careful to counter the plaintiffs' more categorical claims for the NTE's invalidity.[141] In addition to the support they received from ETS, the NEA also was often joined as a party plaintiff by the U.S. Department of Justice's Civil Rights Division, whose head, J. Stanley Pottinger, had begun working with the NEA on the issue of black teacher displacement while he was at the U.S. Department of Health, Education, and Welfare ("HEW").[142]

Pollak, *supra* note 128, at 222 ("I never thought that the ETS was other than in good faith in trying to have tests that were not discriminatory. I think ETS made great efforts to protect against discrimination in its tests."); Interview with Stephen J. Pollak in Washington, D.C. (Oct. 20, 2015) (notes on file with the North Carolina Law Review) (describing ETS employees as being eager to participate in the early cases, and troubled by the uses to which school districts were putting the tests).

140. *See, e.g.*, sources cited *infra* note 141. *See generally* ETS, GUIDELINES FOR USING THE NATIONAL TEACHER EXAM (1971) (on file with George Washington University Libraries in NEA Archives, Box 2190, Folder 2) (explaining the contexts where the use of the NTE was and was not appropriate).

141. *See, e.g.*, Affidavit of James R. Deneen, Educ. Testing Serv., at 16–17, Baker v. Columbus Mun. Separate Sch. Dist., 329 F. Supp. 706 (N.D. Miss. 1971) (No. EC 70-52-S) (on file with the University of Mississippi in J.P. Coleman Collection, Folder 65-19); Interview by Katia Garrett with Stephen J. Pollak, *supra* note 128, at 204; *see also* Affidavit of Winton H. Manning, Educ. Testing Serv., at 31–33, Armstead v. Starkville Mun. Separate Sch. Dist., 325 F. Supp. 560 (N.D. Miss. 1971) (No. EC 70-51-S) (on file with the University of Mississippi in J.P. Coleman Collection, Folder 65-17) (critiquing the Starkville School District's use of the GRE); Brief Amicus Curiae for Educational Testing Service at 20–29, United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975) (No. 4476) (on file with the Educational Testing Service Archives) [hereinafter *North Carolina* Brief Amicus Curiae for Educational Testing Service] (critiquing North Carolina's use of the NTE, and arguing that it was inappropriate, but also extensively discussing the general validity of the test, and suggesting that the plaintiffs' categorical critiques of the NTE should not be addressed); Letter from Shields Sims, Attorney at Law, Sims, Sims & Sims, to Judge J. P. Coleman, U.S. Court of Appeals for the Fifth Circuit, re: Baker v. Columbus, No. EC 70-52-8, at 1 (Sept. 10, 1970) (on file with the University of Mississippi in J.P. Coleman Collection, Folder 65-19) (showing counsel for the school district in *Baker v. Columbus Municipal Separate School District* expressing the view that "[f]rankly, I can not understand how Dr. Deneen [ETS Director of Teacher Testing and an expert witness in a number of NTE cases] still has a job with Educational Testing Service. If I 'ran down' my work as much as he did his I am sure that my boss would fire me, and should.").

142. *See, e.g.*, Memorandum from Boyd Bosma to Dale Robinson re: Plans for NEA-OCR Meeting on Wednesday, December 8, at 1 (Nov. 30, 1971) (on file with George Washington University Libraries in NEA Archives, Series 17, Box 2997); Memorandum from J. Stanley Pottinger, Dir., Office for Civil Rights, U.S. Dep't of Health, Educ. & Welfare, to Chief State School Officers and Superintendents re: Nondiscrimination in Elementary and Secondary School Staffing Practices 1–5 (Jan. 14, 1971) (on file with George Washington University

Rational basis arguments were not the only arguments raised in the NTE cases. There was considerable evidence that the southern jurisdictions adopting the tests had done so for intentionally racially discriminatory reasons.[143] Furthermore, a Fifth Circuit decree regarding teacher desegregation in the case of *Singleton v. Jackson Municipal Separate School District*[144] also offered the basis for arguing that southern states had failed to comply with their existing remedial teacher desegregation obligations.[145] Additionally, by 1971, *Griggs v. Duke Power Co.* also offered a basis for arguing—by analogy to Title VII—that race discrimination necessarily incorporated disparate impact concepts.[146]

The NEA incorporated all of these arguments into its briefs in the various NTE cases.[147] But it also argued that even minimal rationality review demanded constitutional invalidation.[148] Noting that "[i]t is well settled that the Due Process and Equal Protection Clauses . . . prohibit State officials from denying certificates and licenses to professional candidates on the basis of arbitrary requirements[,]" the NEA argued that the use of the NTE and other standardized tests without validation constituted precisely such arbitrary criteria.[149]

Libraries in NEA Archives, Series 17, Box 2997). *See generally* cases cited *supra* note 129 (listing cases in which the United States was sometimes a party plaintiff).

143. *See* cases cited *supra* notes 133–35.

144. 419 F.2d 1211 (5th Cir. 1969) (en banc).

145. *See id.* at 1219.

146. Griggs v. Duke Power Co., 401 U.S. 424, 429–36 (1971).

147. *See generally Armstead* Brief for Appellees, *supra* note 134; Reply Brief of Plaintiff-Intervenors, United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975) (No. 4476) (on file with Stephen Pollak); Plaintiff-Intervenors' Proposed Findings of Fact & Legal Argument, *North Carolina*, 400 F. Supp. 343 (No. 4476) (on file with Stephen Pollak) [hereinafter *North Carolina* Plaintiff-Intervenors' Proposed Findings of Fact & Legal Argument]; *United States v. Chesterfield* Amicus Brief, *supra* note 134.

148. *See* sources cited *supra* note 147. The Civil Rights Division, in contrast, seems to have been much less interested in rational basis arguments in the NTE cases, and indeed often argued exclusively against rational basis as the standard. *See generally* Trial Brief of the United States, *North Carolina*, 400 F. Supp. 343 (No. 4476) (on file with Stephen Pollak); Reply Brief for the United States, *North Carolina*, 400 F. Supp. 343 (No. 4476) (on file with Stephen Pollak). *But cf.* Supplemental Trial Brief of the United States at 4–7, *North Carolina*, 400 F. Supp. 343 (No. 4476) (on file with Stephen Pollak) (arguing that the district court's decision was still valid after *Washington v. Davis* as it was based on rational basis review). ETS and the NAACP LDF also raised the rational basis argument in several of the NTE cases. *See, e.g.*, *North Carolina* Brief Amicus Curiae for Educational Testing Service, *supra* note 141, at 21; Brief for Appellants at 33–40, Walston v. Cty. Sch. Bd. of Nansemond Cty., 492 F.2d 919 (4th Cir. 1974) (Nos. 73-1492, 73-1493) (on file with Stephen Pollak) (represented by NAACP LDF).

149. *North Carolina* Plaintiff-Intervenors' Proposed Findings of Fact & Legal Argument, *supra* note 147, at 65. *See generally* sources cited *supra* note 147. The principal crux of these arguments was typically not that the NTE was, in its content, irrelevant to what teachers do,

And indeed, although not all courts agreed that the use of the NTE and other standardized tests in the South lacked a rational basis, many did. Across a series of cases, both district courts and courts of appeals would hold that—regardless of whether the adoption of such tests was intentionally discriminatory—the ways they had been used by post-desegregation districts failed rational basis review.[150] For example, in the 1972 case of *Armstead v. Starkville Municipal Separate School District*,[151] the Fifth Circuit, citing to *Reed v. Reed*, stated

> Although [the Defendant] may have discretion to establish an appropriate classification, the classification must not be an arbitrary one, i. e., acting without any reasonable basis. . . . We agree with the lower court's finding that the GRE score requirement was not a reliable or valid measure for choosing good teachers.[152]

Other courts similarly embraced rational basis reasoning in striking down use of the NTE and other standardized tests in the post-desegregation South.[153] Thus, although the NEA and other actors challenging such testing requirements were not always successful[154]—and sometimes prevailed on other grounds—rational basis arguments were

but rather that it had not been shown to have any relationship to teacher quality. These arguments were aided by the fact that ETS experts testified in many of the NTE cases that the defendants were using the test for purposes for which it could not provide valid predictive information, such as for teacher retention or rehiring. *See, e.g.*, *United States v. Chesterfield* Amicus Brief, *supra* note 134, at 13–17.

150. *See infra* notes 152–53 and accompanying text.

151. 461 F.2d 276 (5th Cir. 1972).

152. *Id.* at 280 (citing Reed v. Reed, 404 U.S. 71, 75–76 (1971)). In response to Judge Rives's proposed concurrence in part and dissent in part, which referenced Title VII and the *Griggs* disparate impact standard, the author of the opinion, Judge Dyer, would note that "I studiously avoided *Griggs* and the other Title VII Civil Rights Act cases because I thought they were unnecessary . . . [and] I am not sure where it might lead us in this type of case if we start analogizing cases cited under the Civil Rights Act." Letter from Judge David W. Dyer, U.S. Court of Appeals for the Fifth Circuit, to Judge Richard T. Rives, U.S. Court of Appeals for the Fifth Circuit, re: Armstead v. Starkville Mun. Separate Sch. Dist., No. 71-2124, at 1 (May 22, 1972) [hereinafter Letter from Judge Dyer to Judge Rives] (on file with the University of Mississippi in J.P. Coleman Collection, Folder 65-17).

153. *See, e.g.*, United States v. Chesterfield Cty. Sch. Dist., 484 F.2d 70, 75 (4th Cir. 1973); Ga. Ass'n of Educators v. Nix, 407 F. Supp. 1102, 1107–11 (N.D. Ga. 1976); *North Carolina*, 400 F. Supp. at 349–51; *Teachers (Mississippi)*, 3 RACE REL. L. SURV. 161, 180–81 (1972) (reporting on the case of Pickens v. Okalona Mun. Separate Sch. Dist., 380 F. Supp. 1036 (N.D. Miss. 1974)); *see also Armstead*, 461 F.2d at 279–80; *cf.* United States v. Nansemond Cty. Sch. Bd., 351 F. Supp. 196, 202–08 (E.D. Va. 1972) (adopting a robust form of rational basis review, but finding test to be sufficiently validated), *rev'd*, 492 F.2d 919 (4th Cir. 1974).

154. *See, e.g.*, United States v. South Carolina, 445 F. Supp. 1094, 1107–09 (D.S.C. 1977), *aff'd sub nom.* Nat'l Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978). The *South Carolina* litigation, where ETS switched sides and supported South Carolina, was unsuccessful at both the district court and the Supreme Court level. *See infra* notes 158–63.

probably the leading rationale for courts striking down or limiting the growing use of teacher testing to thin the ranks of black teachers.[155] Indeed, into the mid-1970s, courts used rational basis review to strike down uses of the NTE as a basis for discharging or not hiring black teachers—often relying directly on ETS arguments that particular uses of the test were irrational.[156]

But while the NTE cases thus showed the promise of protected class rational basis review, they also ultimately showed its complications.[157] From the start, Pollak had recognized the "very important" role that ETS participation (on the side of the plaintiffs) played in the cases.[158] Eventually, the State of South Carolina, a pioneer in the introduction of discriminatory testing requirements,[159] itself turned to ETS to validate its use of the NTE, commissioning ETS to perform an extensive statistical validation study.[160] And with ETS now defending the use of the exam, the district court did not find its use to be irrational.[161] Ultimately, the NEA would not even raise the rational basis argument on appeal[162]—

155. *See generally supra* note 129 (listing cases in which the NEA participated as parties or amici, many of which were decided favorably on rational basis review).

156. *See* cases cited *supra* note 153.

157. In particular, as described *infra* notes 158–63 and accompanying text, they demonstrated how critically such cases may depend on fact witnesses willing and able to substantiate the irrationality of government practices. *See generally* Marie-Amélie George, Bureaucratic Agency: Administering the Transformation of LGBT Rights (Sept. 27, 2016) (unpublished manuscript) (on file with author) (detailing how social science developments and shifting professional norms outside of the law—which led non-law actors to the conclusion that there was not a viable basis for treating gays and lesbians as mentally ill or less capable parents—played a key role in encouraging state actors to resist and undermine discriminatory state laws targeting gays and lesbians).

158. *See* Interview with Stephen J. Pollak, *supra* note 139.

159. *See, e.g.*, BAKER, *supra* note 132, at 44–62.

160. *See* Motion to Affirm for the State Parties at 32 n.27, Nat'l Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978) (Nos. 77-422, 77-543). *See generally* Brief Amicus Curiae for Educational Testing Service, United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977) (No. 75-1610) (on file with the Educational Testing Service Archives) (describing extensively and defending the validation study that ETS performed for South Carolina), *aff'd sub nom.* Nat'l Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978).

161. *See United States v. South Carolina*, 445 F. Supp. at 1107–09.

162. Rather, the NEA would argue that (1) the district court had erred in not applying the burden-shifting approach to intentional discrimination adopted in *Keyes v. School District No. 1*; and (2) as to the Title VII claims, a more stringent showing than a "rational relationship" was required of the defendants. *See generally* Jurisdictional Statement for the National Education Association et al., *Nat'l Educ. Ass'n v. South Carolina*, 434 U.S. 1026 (Nos. 77-422, 77-543) [hereinafter *Nat'l Educ. Ass'n v. South Carolina* Jurisdictional Statement] (showing that the NEA raised only the two aforementioned arguments on appeal and did not raise the rational basis argument). As discussed *infra*, the amendment of Title VII to include public employers shifted litigants' incentives in ways that encouraged arguments based on rational basis review's weakness as compared to the Title VII disparate impact standard. *See infra* note 433 and accompanying text.

and the Supreme Court would summarily conclude that the use of the test satisfied even Title VII's more rigorous disparate impact standards.[163] Thus, neither rational basis—nor Title VII's disparate impact standard itself—proved to be a panacea for the problems of teacher discrimination in the post-desegregation South.

But if the *South Carolina* litigation unquestionably represented a significant setback for challengers of NTE's use in the South, it did not conclusively put an end to all NTE challenges. Indeed, as late as the mid-1980s, the *North Carolina* NTE litigation—site of one of the early rational basis victories for advocates—remained pending as judges continued to grapple with the new factual and legal context.[164] Ultimately, it would be a further shift by ETS itself that finally put the controversy over the NTE to rest. In response to the enduring criticisms of the NTE's inefficacy and discriminatory effects—problems effectively proven and publicized in the NEA's rational basis litigation—ETS eventually phased out the test entirely.[165]

* * *

Cases like *Chance* and *Armstead*—which invalidated racially impactful government actions on rational basis review—did not represent the only doctrinal approach that courts took in addressing government actions having a racially disparate impact in the early to mid-1970s. Rather, they represented only one of an array of approaches to constitutional disparate impact arguments that succeeded in the lower courts during this time.[166] But it is clear that, for at least some of the

163. *Nat'l Educ. Ass'n v. South Carolina*, 434 U.S. at 1026; *cf. id.* at 1027–28 (White, J., dissenting) (arguing that the statutory standard under Title VII was higher than a "rational basis" and that the case should be set for argument). By the time that the *South Carolina* litigation was resolved by the Supreme Court, the Supreme Court had made clear that the standards under Title VII's disparate impact provisions exceeded those applicable under the Constitution on rational basis review. *See* Washington v. Davis, 426 U.S. 229, 246–48 (1976) (making clear that Title VII's disparate impact requirements did not extend to the Constitution and exceeded the demonstration of "some rational basis").

164. *See generally* Order, United States v. North Carolina, No. 4476 (E.D.N.C. June 23, 1982) (on file with Stephen Pollak) (ruling on various motions at a later stage of the continuing *North Carolina* litigation).

165. *See, e.g.*, *NYC Teachers Protest Exam*, FAIRTEST, http://www.fairtest.org/nyc-teachers-protest-exam [https://perma.cc/R5EN-389K]. Of course, this is not to suggest that the testing systems that have replaced the NTE are themselves free from concern. On the capacity of racial discrimination to replicate itself and adapt to new legal and social environments, see generally Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016) (discussing this issue extensively).

166. There were a number of approaches taken by the lower courts to effects arguments during the early 1970s. Among the most common was to directly apply *Griggs* and the EEOC's guidelines, often without situating them within the constitutional tiers of review at all. *See, e.g.*, Vulcan Soc'y of the N.Y.C. Fire Dep't v. Civil Serv. Comm'n, 490 F.2d 387, 392–

judges who embraced them, such rational basis approaches were important—allowing them to sidestep burgeoning disputes over the proper role of intent in constitutional race discrimination litigation, and providing a more manageable standard than wholesale incorporation of Title VII.[167] As such, even as the Supreme Court increasingly took up and gradually embraced arguments that intentionality marked the *sine qua non* of race discrimination under the constitution, racial justice rational basis arguments allowed many lower courts to continue to sidestep such disputes.[168]

During the 1975 Term, the Supreme Court would finally take up and decide the case that today is thought to be emblematic of such disputes over the role of intent in constitutional race discrimination claims: *Washington v. Davis*. The following Section turns to a discussion of *Davis*, and its role in erasing the history of protected class rational basis review.

B. Washington v. Davis

Despite the success of rational basis racial justice arguments in the lower courts during the early 1970s, such arguments remained largely absent from the Supreme Court's opinions during that same time frame.[169] Thus, although cases raising such arguments reached the Court during the early 1970s, the Court generally ignored or side-stepped addressing them in its final opinions.[170] As such, while there was a well-

97 & n.9 (2d Cir. 1973); Crockett v. Green, 388 F. Supp. 912, 919–21 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715, 716 (7th Cir. 1976); Shield Club v. City of Cleveland, 370 F. Supp. 251, 253–54 (N.D. Ohio 1972); Siegel, *supra* note 29, at 14–15 (describing an array of lower court approaches to effects arguments in equal protection jurisprudence during this era, including several that blended effects/intent arguments).

167. *See, e.g.*, Letter from Judge Dyer to Judge Rives, *supra* note 152, at 1 (indicating that he had "studiously avoided *Griggs* and other Title VII Civil Rights Act cases because [he was] . . . not sure where it might lead" the Court to adopt those standards in the constitutional context); *see also* Memorandum of Judge Wilfred Feinberg, U.S. Court of Appeals for the Second Circuit, to Judge William H. Timbers, U.S. Court of Appeals for the Second Circuit, and Judge Roszel C. Thomsen, U.S. Dist. Court for the Dist. of Md., re: Chance v. Bd. of Exam's, No. 71-2021, at 1 (Mar. 31, 1972) (on file with Columbia University, Rare Book & Manuscript Library, Wilfred Feinberg Collection, Box 32) (indicating that he had revised the majority opinion to "make even more clearly the point that Mansfield did not use the 'compelling interest' test").

168. *See* cases cited *supra* notes 94, 153–54. *See generally* Eyer, *supra* note 88 (documenting the Court's gradual turn toward intent-mandatory standards in the early 1970s).

169. *See* sources cited *infra* note 170.

170. This is true both in cases where the advocates failed to persuade the Justices that their rational basis claims were viable and in those cases where advocates did ultimately persuade the Justices of their arguments. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (avoiding plaintiffs' race discrimination arguments, but holding for plaintiffs on rational basis review). *See generally* Mayeri, *supra* note 57 (discussing *Levy* and other illegitimacy cases in

developed jurisprudence of rational basis arguments in racial justice cases in the lower courts in the 1970s, such arguments were virtually entirely absent from the opinions of the Court itself.[171]

The continued success of such rational basis racial justice arguments in the lower courts, despite the lack of obvious support in the Supreme Court's own racial justice case law, arguably reflected the unique nature of rational basis arguments as a vehicle for racial justice. Because rational basis review represents the lowest tier of review, courts deploying such arguments felt free to rely on—and frequently did rely on—the full array of rational basis cases, seeing no need to restrict themselves to race cases alone.[172] As such, cases like *Reed v. Reed* and *Weber v. Aetna Casualty and Surety Co.*[173]—today generally characterized as simply precursors to heightened scrutiny for sex and illegitimacy, but understood at the time as important rational basis cases—were regularly relied on to state the general rational basis standard by lower courts in the 1970s, including in racial justice domains.[174]

Although the Court had long avoided both addressing racial justice rational basis arguments—and deciding conclusively whether to move sex and illegitimacy classifications out of the rational basis realm—these two disputes would both come to the fore during the 1975 Term. Ultimately, the Court would resolve neither issue, choosing instead to leave to "another day" the issue of how to properly understand its

which the Court found for plaintiffs on rational basis review, but did not address advocates' race or sex discrimination arguments). Conversely, in James v. Valtierra, 402 U.S. 137, 141–43 (1971), the Supreme Court found against the plaintiffs, finding no race discrimination—but also failed to engage with advocates' rational basis arguments, *see id.* at 141–43; *see also* Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of the NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent at 10, *Valtierra*, 402 U.S. 137 (Nos. 154, 226) (making the rational basis argument in a brief for, *inter alia*, the LDF).

171. As Serena Mayeri has documented, intersectional arguments, raising sex and race discrimination issues together, were also made to the Court during this time frame and are similarly invisible today because they do not appear in the Court's published opinions. *See generally* MAYERI, *supra* note 86 (exploring the use of intersectional arguments in early sex discrimination litigation); Mayeri, *supra* note 57 (exploring the use of intersectional arguments in early cases involving nonmarital children).

172. *See generally* cases cited *infra* note 174 (showing that the lower courts relied on rational basis precedents from the sex discrimination and illegitimacy discrimination context to adjudicate race-related rational basis claims).

173. 406 U.S. 164 (1972).

174. *See, e.g.*, Andrews v. Drew Mun. Separate Sch. Dist., 507 F.2d 611, 614 (5th Cir. 1975); Armstead v. Starkville Mun. Separate Sch. Dist., 461 F.2d 276, 280 (5th Cir. 1972); Chance v. Bd. of Exam'rs, 458 F.2d 1167, 1177 (2d Cir. 1972); Ga. Ass'n of Educators v. Nix, 407 F. Supp. 1102, 1108 (N.D. Ga. 1976).

contemporary rational basis jurisprudence.[175] And, although the Court would later come back to sex and illegitimacy classifications—eventually making clear that both should receive a formally heightened standard of review[176]—it would leave other important aspects of rational basis review, including the viability of protected class rational basis review, generally unclear.[177]

Washington v. Davis, filed in 1970 and challenging the use of a widely used civil service test in police hiring, was an unlikely case to bring rational basis racial justice claims to the fore.[178] *Davis* was not litigated in the lower courts as a rational basis racial justice case, but rather under another then-prevalent approach of arguing that the standards under Title VII and the Constitution were coextensive.[179] Thus, although the plaintiffs' complaint raised, *inter alia*, constitutional claims,[180] and the plaintiffs' claims at summary judgment were made on the constitutional bases alone,[181] both the parties and the courts generally treated the statutory and constitutional standards as coextensive.[182] As such, as it came up to the Court, *Davis*'s focus was on whether Title VII standards were met, rather than on equal protection's arguably distinctive tiers of scrutiny.[183]

175. Memorandum from Justice Lewis F. Powell, Jr. to the Conference re: Mass. Bd. of Ret. v. Murgia, No. 74-1044, at 1 (June 15, 1976) (on file with the Washington & Lee University School of Law in Lewis F. Powell, Jr. Papers). *See generally infra* notes 216–24 and accompanying text (discussing the proceedings in *Murgia*).

176. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 554–63.

177. *See generally infra* notes 230–32 and accompanying text, Part IV (noting the ways that the viability of protected class rational basis review was left unclear by the Court's decision in *Davis*). On the Court's continuing failure to reconcile the diverse strands of its rational basis jurisprudence after the 1975 Term, see generally Maltz, *supra* note 52.

178. *See* Washington v. Davis, 426 U.S. 229, 233–34 (1976).

179. *See* sources cited *infra* note 182.

180. *Washington v. Davis*, like many of the cases described herein, was filed before Title VII was expanded to extend to public employers. *See Davis*, 426 U.S. at 238 n.10. The plaintiffs had, however, also raised claims under 42 U.S.C. § 1981 and the anti-discrimination provisions of the D.C. Code. *See* Appendix at 24, *Davis*, 426 U.S. 229 (No. 74-1492) [hereinafter *Davis* Appendix] (Amended Complaint in Intervention), *microformed on* FO-0097-75 (Info. Handling Servs. & Library Educ. Div., Katherine R. Everett Law Library, Univ. of N.C. Sch. of Law).

181. *See Davis*, 426 U.S. at 234 (noting that the respondents' summary judgment motion was based on the Fifth Amendment, not on "any statute or regulation").

182. *See Davis* Appendix, *supra* note 180, at 88–97 (Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment); *id.* at 26–27 (Amended Complaint in Intervention). Simply applying *Griggs* and other Title VII standards was a common approach to constitutional disparate impact claims during this time frame. *See* sources cited *supra* note 166 and accompanying text.

183. *See* Davis v. Washington, 512 F.2d 956, 957 n.2, 959 (D.C. Cir. 1975) (applying *Griggs* and explaining why Title VII cases were relevant to equal protection analysis), *rev'd*, 426 U.S. 229 (1976).

Before the Supreme Court, the parties continued this focus, arguing the case primarily in terms of Title VII standards.[184] Thus, the defendants—although arguing summarily in their brief that the test need only be "rational"—primarily dedicated their brief to arguing that they indeed satisfied the statutory Title VII standards.[185] And the plaintiffs, similarly, focused principally on arguments under the statutory standard, restricting their constitutional arguments to two footnotes suggesting that the constitutional and statutory standards should be the same.[186]

Similarly, the amici in *Davis* mostly addressed the constitutional issue only perfunctorily, if at all, apparently content to allow the Court to treat the case as one in which Title VII standards governed. Thus, the LDF, for example, filed a brief that presumed that Title VII applied, and then argued principally that under Title VII the Court must apply a higher standard than rational basis.[187] And ETS, participating as amici, alluded to the constitutional dimension of the case only in a footnote—virtually exclusively focusing on the statutory standards.[188] Other amici were similarly circumspect, alluding to the possibility of differing standards for constitutional claims only in passing, if at all.[189] As such,

184. There were two separate issues relating to statutory standards that were often conflated or simply ignored in the parties' arguments in *Davis*: first, whether the case should be decided on the statutory causes of action actually brought by plaintiffs (which did not include a Title VII claim—as Title VII did not apply to District of Columbia employees when the case was brought—but did include § 1981 and D.C. Code claims), and if so what those standards were; and second, whether Title VII standards were the applicable standards directly under the Constitution. *See Davis*, 426 U.S. at 238–52. Although the parties did not seem eager to directly address either of these specific questions, ultimately the Supreme Court would address them both. *See id.*

185. *See* Brief for Petitioners at 2, 16–35, *Davis*, 426 U.S. 229 (No. 74-1492); *see also* Brief of the Federal Respondents at 1, 14–15, *Davis*, 426 U.S. 229 (No. 74-1492) (assuming that Title VII standards applied).

186. *See* Brief for Respondents at 15 n.21, 26 n.35, *Davis*, 426 U.S. 229 (No. 74-1492).

187. *See* Brief of NAACP Legal Defense & Education Fund, Inc. as Amicus Curiae at 2–9, *Davis*, 426 U.S. 229 (No. 74-1492). The LDF brief in *Davis* appears to display the shifting incentives that advocates confronted more generally after the amendment of Title VII to apply to public employees, which encouraged arguments which promoted the strength of the statutory standard—arguments which were typically most easily made by distinguishing the statutory standard from the less stringent rational basis standard. *See id.* at 7.

188. Brief Amicus Curiae for Educational Testing Service at 40 n.56, *Davis*, 426 U.S. 229 (No. 74-1492).

189. *See* Brief of American Society for Personnel Administration as *Amicus Curiae* at *ii, 15 & n.18, *Davis*, 426 U.S. 229 (No. 74-1492) (referring ambiguously to the possibility that there might be differences in the treatment of "public" employment, but never directly referencing the equal protection clause or the Constitution); Brief of the Executive Committee of the Division of Industrial-Organizational Psychology (Division 14) of the American Psychological Association at *2, 26 n.47, *Davis*, 426 U.S. 229 (No. 74-1492) (same).

there was little discussion in the briefing before the Court, in either the parties' or the amici's briefs, of the case's constitutional dimensions.[190]

Although the amici and parties in *Davis* were largely silent on the constitutional issue, other cases the same Term would make clear that rational basis arguments were increasingly being deployed by plaintiffs with racial justice claims. For example, in petitioning for certiorari in the case of *Tyler v. Vickery*[191]—a challenge to the Georgia Bar Exam's racially disparate impact—the ACLU and private counsel Ray McClain relied extensively on protected class rational basis arguments, suggesting that racially disparate impact should trigger the "fair and substantial relation" test adopted by *Reed* and other early 1970s rational basis precedents.[192] Similarly, in the case of *Drew v. Andrews*—ultimately dismissed as improvidently granted by the Court and discussed more fully in Part III[193]—the plaintiffs' attorneys prominently deployed protected class rational basis arguments in support of their claims.[194]

190. Indeed, the original certiorari memo circulated to the Court's "cert pool" did not discuss the constitutional dimension of the case at all. *See* Preliminary Memorandum from S., law clerk, re: Washington v. Davis, No. 74-1492, at 1–5 (Aug. 22, 1975) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers).

191. 426 U.S. 940 (1976) (mem.).

192. *See* Petition for a Writ of Certiorari at 10, *Tyler*, 426 U.S. 940 (No. 75-1026). Showing the intersection among many of the early 1970s arguments made in the lower courts in racial disparate impact cases, the ACLU also argued that the "fair and substantial" relation standard demanded a showing essentially equivalent to that under Title VII. *See id.* at 4, 10. There was a substantial divide within the ACLU about whether to petition for certiorari review in *Tyler*, with preeminent figures such as Ruth Bader Ginsburg expressing concerns. *See* Letter from Ruth Bader Ginsburg to Mel Wulf re: Tyler v. Vickery, No. 75-1026, at 1 (Jan. 30, 1976) (on file with Princeton University Seeley G. Mudd Manuscript Library in ACLU Collection, Box 3551); Letter from Laughlin McDonald, Dir., S. Reg. Office, ACLU Foundation, Inc., to Melvin L. Wulf, ACLU, re: Tyler v. Vickery, No. 75-1026, at 1 (Dec. 17, 1975) (on file with Princeton University Seeley G. Mudd Manuscript Library in ACLU Collection, Box 3551); Letter from Ruth Bader Ginsburg to Laughlin MacDonald, S. Reg. Office, ACLU, re: Tyler v. Vickery, No. 75-1026, at 1 (Sept. 22, 1975) (on file with Princeton University Seeley G. Mudd Manuscript Library in ACLU Collection, Box 3551). It also appears that the decision to frame the issue on the merits within the rubric of protected class rational basis review was a modification from the original certiorari petition, which instead sought to argue directly for the viability of statutory-style disparate impact claims under the Fourteenth Amendment, distinguishing prior precedents such as *Jefferson v. Hackney*, 406 U.S. 535 (1972), and *Geduldig v. Aiello* on the grounds that they did not apply to administrative action. *See* ACLU, Draft Petition for a Writ of Certiorari re: Tyler v. Vickery, No. 75-1026, at 6–9 (undated) (on file with Princeton University Seeley G. Mudd Manuscript Library in ACLU Collection, Box 3551).

193. 425 U.S. 559 (1976) (mem.) (per curiam) (dismissing certiorari as improvidently granted).

194. *See* Brief of Respondents at 37–49, *Drew*, 425 U.S. 559 (No. 74-1318), *microformed on* FO-0113-75 (Info. Handling Servs. & Library Educ. Div., Katherine R. Everett Law Library, Univ. of N.C. Sch. of Law) [hereinafter *Drew* Respondents' Brief]. *See generally* Oral Argument, *Drew*, 425 U.S. 559 (No. 74-1318) [hereinafter *Drew* Oral Argument], https://www.oyez.org/cases/1975/74-1318 [https://perma.cc/M4KY-PF3G (staff-uploaded

Thus, at the time that *Davis* came before the Court, constitutional disparate impact arguments—and in particular those invoking protected class rational basis review—were presented to the Court, just not in the briefing of *Davis* itself.

And indeed, although the parties seemed content to avoid the constitutional issue in *Davis*, the Justices were not. Concerned that *Davis* would be used to "constitutionalize *Griggs* and Title VII *sub silentio*[,]"[195] Justices, including Powell and Rehnquist, pushed the parties at oral argument on the proper constitutional standard, bringing the issue to the fore.[196] Questioning whether "the standards applicable under the Equal Protection Clause are identical to the standards applicable under Title VII[,]"[197] several of the Justices repeatedly pushed the parties to more clearly differentiate the standards applicable to the plaintiffs' constitutional claims.[198]

Perhaps unsurprisingly, defense counsel for Washington, D.C., David Sutton, argued in response to these queries for the application of rational basis review—although he also admitted that he thought the statutory and constitutional standards were "pretty close[.]"[199] But so did the plaintiffs' counsel, prominent civil rights attorney and sometimes Washington Research Fund employee, Richard B. Sobol.[200] In 1969, Sobol and his co-counsel George Cooper had written an early and influential article in the *Harvard Law Review* explaining the theory of why test and seniority provisions having a racially disparate impact should be considered race discrimination under Title VII.[201] In that

archive)] (recording discussions of rational basis and racial justice arguments at oral argument); *infra* Section III.B (discussing *Drew*).

195. *See* Memorandum from CW, law clerk, to Justice Powell re: Washington v. Davis, No. 74-1492, at 6 (Feb. 23, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) (showing Powell's handwritten notation "Yes" next to this quote by CW).

196. *See* Transcript of Oral Argument at 11–14, 16–17, 22–24, 28–33, 45–57, 60, 68–69, Washington v. Davis, 426 U.S. 229 (1976) (No. 74-1492) [hereinafter *Davis* Oral Argument Transcript].

197. *Id.* at 16.

198. *Id.* at 16–17, 22–25, 28–31.

199. *Id.* at 16; *see also id.* at 12–13, 16–17, 24–25. One of the curious features of *Washington v. Davis* is that both the plaintiffs and the defendants appear to have generally agreed that rational basis was the standard, but that that standard entailed something closely resembling the Title VII disparate impact standards. *See id.* at 12–13, 16–17, 24–25; sources cited *infra* note 200.

200. *See Davis* Oral Argument Transcript, *supra* note 196, at 48–57, 68, 75; *see also* Interview by Joseph Mosnier, Ph.D., with Richard B. Sobol, in New Orleans, La. 51–52 (May 26, 2011), https://cdn.loc.gov/service/afc/afc2010039/afc2010039_crhp0015_sobol_transcript/afc2010039_crhp0015_sobol_transcript.pdf [https://perma.cc/YYW8-D4G4].

201. *See* George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82

article, Sobol and Cooper had argued as to public employment that "the law seems to be moving toward emphasis on the impact of [the] challenged action rather than on the purposes behind it[,]" i.e, that impact was the relevant constitutional standard.[202]

But by the time Sobol argued *Davis* in 1976, he apparently read the applicable law differently.[203] Cases such as *James v. Valtierra*[204] and *Jefferson v. Hackney*[205] had been decided by the Supreme Court in the interim, strongly suggesting that the Court was not inclined to adopt a constitutional standard under which impact alone sufficed to trigger heightened scrutiny.[206] Therefore, Sobol, like a number of his contemporaries, apparently believed by the time *Davis* was argued that disparate impact arguments for strict scrutiny were likely foreclosed.[207] Thus, when probed at oral argument for his position on whether strict scrutiny was appropriate, Sobol demurred, repeatedly stating that, "we have not argued and have never argued that there is a racial classification in this case which demands strict scrutiny or a compelling interest. We are content to rely on the necessity that there be a rational basis for the use of [the] test . . . ."[208]

HARV. L. REV. 1598, 1649–69 (1969) (laying out theory of why disparate impact discrimination should be considered a form of discrimination under Title VII); *see also* GREENBERG, *supra* note 103, at 450 (discussing the influence of Cooper and Sobol's "theoretical approach" on the NAACP's legal theory in *Griggs*); Garrow, *supra* note 103, at 217–18, 220–21 (noting the major role played by both the article and Cooper himself directly in framing the *Griggs* arguments on appeal).

202. *See* Cooper & Sobol, *supra* note 201, at 1671 n.4.

203. *See infra* notes 206–08 and accompanying text.

204. 402 U.S. 137 (1971).

205. 406 U.S. 535 (1972).

206. *See Valtierra*, 402 U.S. at 141–42 (rejecting Fourteenth Amendment equal protection race discrimination claim in the context of discrimination against low-income housing, and suggesting that the relevant inquiry was whether the classification rested on "distinctions based on race" (quoting Hunter v. Erickson, 393 U.S. 385, 391 (1969))); *see also Jefferson*, 406 U.S. at 546–49, 549 n.18 (relying on *Valtierra*, rejecting a constitutional challenge to government action that clearly had a racially disparate impact). *See generally* Eyer, *supra* note 88, at 22–59 (documenting the many small steps the Court took during the early 1970s toward an intent-mandatory approach to equal protection).

207. *See, e.g.*, *Davis* Oral Argument Transcript, *supra* note 196, at 56–57 (stating that he (Sobol) read the "California housing case" (i.e., *Valtierra*) as indicating that racial impact does not alone create a racial classification or demand strict scrutiny); *see also id.* at 53 (showing Sobol discussing *Jefferson v. Hackney* at oral argument); Memorandum from Richard F. Bellman, Staff Counsel, Nat'l Comm. Against Discrimination in Hous., Inc., to Edward Rutledge & Jack E. Wood, Jr., Exec. Co-Dirs., Nat'l Comm. Against Discrimination in Hous., Inc. re: The Implications of the *Valtierra* Decision 3 (May 3, 1971) (on file with the Library of Congress in NAACP Collection, Box VI:F73, Folder 9) (noting that *Valtierra* "appears to have immunized all exclusionary zoning and land-use practices from Fourteenth Amendment attack, except in those cases in which a clear *racially* discriminatory purpose can be established").

208. *Davis* Oral Argument Transcript, *supra* note 196, at 57.

Nevertheless, embracing the tradition of protected class rational basis review, Sobol also argued that there was no "rational basis" for the employer's use of the test.[209] Noting that "the only rational basis for the use of a test is that it does the employer some good[,]" Sobol contended that the defendant had failed to show that there was any relationship at all between performance on the test and the "skills needed by a policeman."[210] Thus, although Sobol, like the defendants, generally argued that the Title VII and constitutional standards were comparable, he situated both as demanding only a showing of "rationality[.]"[211]

But although Sobol thus eschewed traditional race discrimination arguments—situating the case instead within the rubric of protected class rational basis arguments—at conference, the Justices did not meaningfully engage with the rational basis argument.[212] Thus, although several of the Justices adverted to commonalities or differences between the statutory and constitutional standards, it appears that none attempted to situate the case within the Court's rational basis jurisprudence.[213] Ultimately, seven Justices would vote for reversal, concluding that under the applicable standards, the test satisfied constitutional review.[214]

Although this desire to avoid the rational basis arguments in *Davis* may have reflected the Justices' general disinclination to engage with such arguments, it may also have reflected the complications of other

209. *See id.*; sources cited *infra* notes 210–11 and accompanying text; *see also* George Cooper, *Introduction: Equal Employment Law Today*, 5 COLUM. HUM. RTS. L. REV. 263, 275 (1973) (showing Sobol's co-counsel, in an article three years prior to *Washington v. Davis*, observing that the Fourteenth Amendment "bars all arbitrary action against any class"—not just those protected under Title VII—in the public employment context).

210. *Davis* Oral Argument Transcript, *supra* note 196, at 57, 63.

211. *See id.* at 49, 51–57, 62–63; *see also* Justice Lewis F. Powell, Jr., Oral Argument Notes re: Washington v. Davis, No. 74-1492, at 3 (Feb. 25, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) ("[Sobol] do[es] *not* argue that there is *a racial classification*—thinks it is not. Therefore does not think strict scrutiny test applies. Applicable test is rational basis.").

212. *See infra* notes 213–14 and accompanying text.

213. *See* Justice Harry A. Blackmun, Docket Sheet re: Washington v. Davis, No. 74-1492, at 1–2 (Mar. 5, 1976) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 224, Folder 5) (showing none of the justices attempting to situate the case within the Court's rational basis jurisprudence, but focusing on the Title VII-equal protection divide); Justice William J. Brennan, Jr., Docket Sheet re: Washington v. Davis, No. 74-1492, at 1–2 (undated) (on file with the Library of Congress in William J. Brennan, Jr. Papers, Box I:368, Folder 7) (same); Justice Lewis F. Powell, Jr., Docket Sheet re: Washington v. Davis, No. 74-1492, at 1–2 (undated) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) (same); Justice Potter Stewart, Docket Sheet re: Washington v. Davis, No. 74-1492, at 1–2 (undated) (on file with Yale Manuscripts & Archives in Potter Stewart Papers, Box 426) (same).

214. *See* Washington v. Davis, 426 U.S. 229, 231, 248 (1976); sources cited *supra* note 213.

pending matters. By the time *Davis* was argued, internal disputes had erupted in the seemingly unrelated case of *Massachusetts Board of Retirement v. Murgia*[215] over the appropriate approach to the Court's rational basis review standards generally.[216] Although *Murgia* nominally involved the constitutionality of Massachusetts's mandatory retirement rules for police officers—rules that were ultimately upheld virtually unanimously by a per curiam opinion—internally it marked a major reckoning among the Justices over the proper understanding of their recent rational basis precedents.[217]

At the center of such disputes was the proper stature of the Court's recent sex and illegitimacy cases—and whether they were properly understood as reflecting the Court's general rational basis approach or instead as some form of formally heightened standard of review.[218] But concerns over racial justice also colored at least some of the Justices' perspectives in *Murgia* as well. Thus, for example, Justice Powell argued in a proposed majority opinion for the Court that "the relationship [on rational basis review] may not be trivial or illogical, as this would fail to comport with the requirement of rationality and may indicate that the defined purpose actually masks an improper (for example, racially discriminatory) purpose."[219]

But although *Murgia* showed that at least some of the Justices were aware of the potential for connections between racial justice and rational basis review,[220] it was also, by the spring, apparent that the

215. 427 U.S. 307 (1976) (per curiam).

216. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 544–54 (detailing the internal deliberations in *Murgia*); Maltz, *supra* note 52, at 267–76 (same).

217. *See Murgia*, 427 U.S. at 308–17; *see also* Eyer, *Constitutional Crossroads*, *supra* note 1, at 544–54 (detailing the internal deliberations in *Murgia*); Maltz, *supra* note 52, at 267–76 (same).

218. For an extended account of the role that disputes over the sex and illegitimacy cases played in *Murgia*, see Eyer, *Constitutional Crossroads*, *supra* note 1, at 544–54.

219. Justice Lewis F. Powell, Jr., Draft Opinion re: Mass. Bd. of Ret. v. Murgia, No. 74-1044, at 15 n.17 (May 19, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers).

220. Powell's relationship to these arguments is difficult to ascertain from the historical record. While his draft opinion in *Murgia* seems to suggest his attentiveness to the interrelationship of rational basis arguments and racial justice concerns, he was quite dismissive of the arguments for constitutional invalidity put forward in the bar exam case, *Tyler v. Vickery*, which also made racial justice rational basis arguments. *See* Brennan, *supra* note 213, at 2 (identifying Powell as stating, in relation to *Davis*, "Not a Title VII case . . . . The bar exam case from 5th Circ [*Tyler v. Vickery*] flatly & properly rejects that analysis"). But in *Tyler*, both the Court of Appeals (which rejected plaintiffs' constitutional claims) and the plaintiffs (who argued for constitutional invalidity) framed their arguments in terms of rational basis precedents like *Reed v. Reed*. *Compare* sources cited note 192 (demonstrating that the *Tyler v. Vickery* plaintiffs' petition for certiorari review relied principally on *Reed*), *with* Tyler v. Vickery, 517 F.2d 1089, 1096, 1101 (5th Cir. 1975) (concluding that Title VII

Justices might not be able to reach a resolution in that case as to the proper approach.[221] Thus, although many of the Justices agreed in *Murgia* that something more than a uniformly deferential approach to rational basis review was appropriate, they continued to have deep divisions about what precisely such an approach would entail.[222] Ultimately, Justice Powell would come close to obtaining a majority for formalizing a more rigorous approach to rational basis review.[223] But that effort would finally fail over internal differences, and the Justices would instead agree to issue a bland per curiam opinion, leaving the Justices free to "fight . . . another day" as to the proper approach to rational basis review.[224]

Perhaps because of these roiling disputes in *Murgia*[225]—over the foundational issue of the Court's basic rational basis standard—the majority opinion in *Davis* ultimately only obliquely engaged with Sobol's rational basis arguments.[226] Holding that "the Court of Appeals

standards did not apply, and applying *Reed*, but finding that the exam established a valid classification under *Reed*). As a result, it is difficult to interpret Powell's comments in this regard, aside from their disavowal of the notion that Title VII standards directly apply under the Constitution.

221. *See* Maltz, *supra* note 52, at 267–69.

222. *Id.* at 270–76.

223. *See id.* at 270–72 (showing that—although the Justices were divided as to the specifics—Justices Brennan, White, Stewart and Blackmun all at some point following the circulation of Powell's draft indicated that they would be willing to endorse elements of his reasoning providing for more systematically meaningful standards of rational basis review). The push to use *Murgia* as a vehicle for institutionalizing a more rigorous approach to rational basis review originally came from Justice Brennan, but he turned authorship of the majority opinion over to Powell when divisions emerged on the Court in relation to Brennan's original draft. *See id.* at 267, 270; *see also* Eyer, *Constitutional Crossroads*, *supra* note 1, at 546–50.

224. *See* Memorandum from Justice Lewis F. Powell, Jr. to the Conference, *supra* note 175, at 1 (noting that the per curiam disposition "leaves, I think, each of us free to 'fight again another day' " regarding the appropriate approach to rational basis review); Maltz, *supra* note 52, at 276

225. I have not found any historical materials directly connecting *Murgia* and *Davis*. However, the divides that the debates in *Murgia* unearthed regarding the Justices' perspectives on the proper approach to rational basis review clearly were relevant to any engagement with Sobol's rational basis theory, since his theory depended on the application of meaningful standards of rational basis review—precisely the subject of the Justices' debates in *Murgia*. *Compare* sources cited *supra* notes 215–24 (discussing the internal debates in *Murgia* over whether the Court's precedents demanded meaningful rational basis review), *with Davis* Oral Argument Transcript, *supra* note 196, at 53–54 (articulating the view that meaningful rational basis review of the test at issue was required). Given this fact—and the fact that a majority of the Justices viewed the test at issue in *Davis* as sufficiently related to the job to meet the more stringent statutory standards—it is not difficult to see why the Justices might have eschewed addressing Sobol's argument more directly. *See* Washington v. Davis, 426 U.S. 229, 248–52 (1976) (holding that the test at issue in *Davis* satisfied even the more demanding statutory standards).

226. The Court would also, the same Term, dodge racial justice rational basis arguments in *Drew Municipal Separate School District v. Andrews*. Drew Mun. Separate Sch. Dist. v.

erroneously applied the legal standards applicable to Title VII cases[,]" the Court in *Davis* did reject both parties' claims that the Title VII and constitutional standards were coextensive.[227] But rather than engaging directly with the argument that the plaintiffs had in fact made—that *rational basis* required at least some showing of job-relatedness—the Court instead focused on a claim that no party had made: that impact alone was sufficient to make a claim of racial discrimination under the Constitution.[228] And thus framed, the Court would famously conclude that discriminatory purpose—not impact—was the touchstone of a showing of constitutional discrimination.[229]

This framing—while solidifying the Court's turn to an intent-based standard for constitutional race discrimination—did little to clearly address the nature or viability of protected class rational basis review.[230] Thus, although the Court unfavorably cited to some of the existing protected class rational basis cases decided in the lower courts, it disapproved them only "to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation"—language clearly inapplicable to Sobol's rational basis theory.[231] The Court also did not meaningfully engage with the rationality of the classification at issue in *Davis* itself, summarily suggesting only that, "it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees . . . particularly where the job requires special ability to communicate orally and in writing."[232]

* * *

Andrews, 425 U.S. 559, 559 (1976) (mem.) (per curiam) (dismissing the writ of certiorari as improvidently granted); *see infra* Section III.B.

227. *Davis*, 426 U.S. at 238–39.

228. *Id.* at 239–48.

229. *Id.* at 239–43.

230. *See* Eyer, *supra* note 88, at 53–54 (discussing the impact of *Davis* on solidifying the Court's existing turn to an intent-based standard for constitutional race discrimination).

231. *See Davis*, 426 U.S. at 244–45. Note that this language was a retreat from language in Justice White's original draft, which categorically stated, "[W]e cannot agree with these decisions." *See* Justice Byron White, Draft Opinion re: Washington v. Davis, No. 74-1492, at 14 (first draft, undated) (on file with the Library of Congress in Byron White Papers, Box 348, Folder 10). While the original wording could potentially be read as repudiating the specific legal approach of invalidating racially impactful laws on rational basis review, the wording in the ultimately published draft could not, as proof of "discriminatory racial purpose" is not necessary to making out a rational basis violation, and indeed would automatically take one out of the realm of rational basis review. *See Davis*, 426 U.S. at 239–41.

232. *Davis*, 426 U.S. at 245–46.

Ultimately, although the parties in *Davis* squarely framed the case within the rubric of protected class rational basis review, the Justices declined to adopt that framing.[233] As such, protected class rational basis arguments did not form a part of *Davis*'s much-discussed legacy. Indeed, the erasure of protected class rational basis review from the opinion was so complete that—although *Davis* itself has become famous in the canon of constitutional equality law—the very idea of protected class rational basis review has largely been forgotten. Instead, heightened scrutiny (and its attendant showing of "intentional discrimination") emerged in *Davis*'s aftermath as the exclusive canonical account of how racial minorities achieve constitutional change.[234]

But even as protected class rational basis review was gradually erased from the canon, its impacts endured. Title VII's expansion to cover public employees—resulting in part from the perceived unfairness and irrationality of employment practices initially challenged on rational basis review—meant that much of the work originally done under the rubric of protected class rational basis review had, by the mid-1970s, a firm statutory grounding.[235] Thus, challenges to the unfairness and irrationality of public employment testing regimes have continued under statutory disparate impact doctrine, sometimes leading to considerable changes in public employment selection practices.[236] Other struggles—such as those against the NTE—ultimately resulted in change outside the courts, as criticisms originally made by racial justice advocates in protected class rational basis litigation became entrenched and widespread.[237]

Moreover, although protected class rational basis review faded from the canon—and rational basis review generally entered an era where it was less robust—the use of rational basis review by racial justice advocates never entirely disappeared.[238] Thus, the tradition of

233. *See supra* notes 225–32 and accompanying text.

234. *See supra* notes 15–17 and accompanying text.

235. *See, e.g.*, REPORT OF THE COMM. ON LABOR & PUB. WELFARE, S. REP. NO. 92-415, at 11–12 (1971) (alluding explicitly to some of the early decisions in which advocates relied in part on rational basis arguments in challenging public employment testing regimes in the debates over whether to amend Title VII to include public employees).

236. For a discussion of some of this continuing work in the public employment context, as well as the impact it has had on improving approaches to employee selection in public employment, see, for example, Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 253–56 (2010).

237. *See supra* note 165 and accompanying text.

238. This is not to suggest that protected class rational basis review arguments have not retrenched since the 1970s—they have. However, as elaborated in Part IV, the reasons for that retrenchment appear to have more to do with general fluctuations in the standards

protected class rational basis review endures today: in the decisions of judges questioning the crack/cocaine disparity, invalidating ex-offender employment restrictions, and problematizing the denial of public services to impoverished neighborhoods.[239] Moreover, as Part IV elaborates, we are today poised at a constitutional moment—like the moment that arose in the 1970s—that renders the resurgence of such arguments uniquely plausible. Before describing these contemporary possibilities, Part III returns first to the history of the use of protected class rational basis arguments; describing the ways that such arguments were used by sex equality advocates in the 1970s.

III. SEX DISCRIMINATION AND THE ROLE OF RATIONAL BASIS REVIEW IN BOUNDARY DISPUTES IN THE 1970S[240]

In the race discrimination context, disputes regarding the boundaries of constitutional race discrimination—and the turn to protected class rational basis review that they inspired—arose only after the instantiation of race as a suspect class.[241] In contrast, in the sex discrimination context, major questions regarding the boundaries of sex discrimination arose virtually immediately, and thus were considered simultaneously with advocates' early efforts to situate sex discrimination as subject to a heightened form of constitutional review.[242] Thus, in the early 1970s, arguments over the boundaries of what was "discrimination because of sex" were often intertwined with more general arguments over whether rational basis, or some higher standard, marked the appropriate standard of review for sex discrimination.[243]

As a result, sex equality advocates often had dual motivations for making rational basis arguments in the early 1970s. Such arguments

applied to rational basis review than decisions like *Davis*. *See infra* Part IV. Moreover, even during the era in the 1990s when rational basis review was treated as most deferential (and thus protected class rational basis review claims were least plausible), protected class rational basis review continued to be used to destabilize the existing constitutional consensus regarding the fairness and neutrality of important racially impactful practices, such as the crack/cocaine disparity. *See infra* notes 464–72 and accompanying text. As elaborated in Part IV, as contemporary rational basis standards are becoming increasingly meaningful, we stand at a unique juncture for again further expanding the potential of protected class rational basis review.

239. *See supra* cases cited note 31; *infra* cases cited notes 438 and 464–72.

240. My discussion in this Part is greatly indebted to the work of a number of outstanding legal historians, who have previously unearthed the history of many of the cases I discuss herein, including Serena Mayeri, Karen Tani, and Deborah Dinner. *See generally* MAYERI, *supra* note 86; Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343 (2010); Mayeri, *supra* note 57; Karen M. Tani, *supra* note 57.

241. *See supra* Section II.A.

242. *See infra* Sections III.A–.B.

243. *See infra* Sections III.A–.B.

were necessitated not only by the possibility that a court might not find that a particular form of discrimination was "because of sex," but also by the then-likely probability that the court might find, regardless, that only rational basis review applied.[244] In a time when many courts continued to apply rational basis review generally to sex discrimination classifications, boundary disputes were far from the only reason to raise rational basis arguments.

Nevertheless, advocates' turn to rational basis arguments did have, much like in the race context, salutary effects for disputes over sex discrimination's boundaries. Litigation challenging pregnancy discrimination and intersectional discrimination—today among constitutional sex discrimination's most intractable domains—was comparatively successful in the early 1970s, in part because the boundaries of sex discrimination mattered far less under a rational basis standard.[245] Thus, definitional issues that are today heavily policed—as the gateway to heightened scrutiny[246]—attracted far less disputation, and were often sidestepped altogether, in a rational basis regime.[247] Below, two of the most prominent areas in which early gender equality advocates sidestepped such definitional issues—pregnancy discrimination and intersectional discrimination—are discussed.

A. The Role of Rational Basis Arguments in Early Pregnancy Discrimination Litigation (1971–1974)

Early on, advocates in the women's rights movement made challenging pregnancy discrimination a top priority.[248] Recognizing that discrimination related to pregnancy marked one of the most significant obstacles to equality for women, pregnancy cases virtually immediately occupied a central place in women's rights advocates' expanding constitutional docket.[249] As such, by the early 1970s, an increasingly

244. *See infra* Sections III.A–.B.

245. *See infra* Sections III.A–.B.

246. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271–74 (1993) (rejecting § 1985 claim for conspiracy to deprive women of the right to abortion because there was no sex-based animus where animus was aimed at abortion and not women per se); Risa E. Kaufman, Note, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 314–21 (1997) (noting the inadequacy of federal equal protection doctrine to address welfare discrimination against poor black women, due to gatekeeping cases such as *Davis*).

247. *See infra* Sections III.A–.B.

248. *See* MAYERI, *supra* note 86, at 63.

249. *Id.*; *see also* Dinner, *supra* note 240, at 349–50.

large number of cases challenging pregnancy discrimination under the equal protection clause were pending in the lower courts.[250]

In such pregnancy discrimination cases, advocates were regularly faced with arguments that today would be considered risible regarding pregnant women: that such women became increasingly "unattractive";[251] that they would prompt student jokes or tittering;[252] and that they were incapable of concentrating due to their preoccupation with "the three classic fears of pregnancy—miscarriage, agony in labor, and a deformed child."[253] But coupled with such arguments were also often less obviously stereotypical rationales, such as the need for continuity (a prime concern for teachers), and the possibility that pregnant women might, at some point in their pregnancy, become genuinely physically incapacitated.[254]

In responding to such arguments, early pregnancy discrimination plaintiffs had little alternative but to make the case for such policies' invalidity under rational basis review. Although even the earliest advocates typically also made arguments for heightened scrutiny[255]—based on the argued involvement of sex discrimination and the burden

250. *See* MAYERI, *supra* note 86, at 63; Dinner, *supra* note 240, at 349–50. These cases arose across a host of different contexts, including, *inter alia*, discrimination against pregnant state employees, *see, e.g.*, LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 1185 (6th Cir. 1972) (teachers), *aff'd*, 414 U.S. 632 (1974); Schattman v. Tex. Emp't Comm'n, 459 F.2d 32, 33 (5th Cir. 1972) (administrative employees); *infra* notes 268–91 and accompanying text (teachers), exclusion of pregnancy from publicly funded disability plans, *see, e.g.*, Aiello v. Hansen, 359 F. Supp. 792, 793–94 (N.D. Cal. 1973), *rev'd sub nom.* Geduldig v. Aiello, 417 U.S. 484 (1974); *infra* notes 295–317 and accompanying text, and ineligibility of pregnant women for unemployment compensation, *see, e.g.*, Turner v. Dep't of Emp't Sec., 423 U.S. 44, 44 (1975).

251. Justice Harry A. Blackmun, Memorandum to Self re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 3–4 (Oct. 15, 1973) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 175, Folder 1) (expressing the view that "[i]t is true that in the later stages of an individual pregnancy a woman may appear rather unattractive[,]" but noting that this issue "could be handled adequately, I think, on an individual basis").

252. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974).

253. Brief for Petitioners at 5, *LaFleur*, 414 U.S. 632 (No. 72-777).

254. *See, e.g.*, *LaFleur*, 414 U.S. at 648.

255. *See, e.g.*, Plaintiff's Brief on the Merits at 18–21, Cohen v. Chesterfield Cty. Sch. Bd., 326 F. Supp. 1159 (E.D. Va. 1971) (No. 678-70-R) (on file with the National Archives at Philadelphia) [hereinafter *Chesterfield* Plaintiff's Brief on the Merits]; Reply Brief to Trial Memorandum of Defendants at 9–11, LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971) (Nos. C 71-292, C 71-333) (on file with the Western Reserve Historical Society in Women's Law Fund Records). For an excellent history of the early development of pregnancy discrimination challenges that emphasizes the heightened scrutiny arguments made by plaintiffs, see Dinner, *supra* note 240, at 349–52. Although my focus herein is on the rational basis arguments raised by such plaintiffs (in view of the subject of this paper), such plaintiffs, as Dinner argues and unearths, also raised rich intertwined claims to sex equality and reproductive liberty. *Id.*

on fundamental rights—such arguments initially had only very thin doctrinal underpinnings.[256] As such, advocates also labored to make the case for the irrational and spurious nature of pregnancy policies, an endeavor often aided by the antiquated and stereotypical justifications offered by those arguing in their defense.[257] Thus, sex equality advocates argued not only that pregnancy discrimination should be afforded heightened scrutiny—because, *inter alia*, it was a form of sex discrimination and sex discrimination should be afforded heightened scrutiny (both open questions at the time)—but also that pregnancy-based classifications were themselves irrational.[258]

Although such rational basis arguments by sex equality advocates appear to have been motivated at least as much by uncertainty over the general sex discrimination standard as by defendants' arguments that pregnancy discrimination was not sex discrimination, they would prove valuable in responding to both.[259] Judges ruling in favor of sex equality advocates' claims quickly embraced the idea that policies that discriminated on the basis of pregnancy failed to further any rational government interest—finding that legitimate concerns, such as continuity, were as often hindered as helped by such policies.[260] And

256. At least two of the early prominent cases that were filed challenging pregnancy discrimination policies, *Cohen v. Chesterfield County School Board* and *LaFleur v. Cleveland Board of Education*, had been fully litigated at the district court level before *Reed v. Reed*, the first case in which the Supreme Court reversed its trajectory of rejecting sex discrimination claims, was decided. *See Chesterfield*, 326 F. Supp. at 1159 (decided on May 17, 1971); *LaFleur*, 326 F. Supp. at 1209 (decided on May 12, 1971); *cf.* Reed v. Reed, 404 U.S. 71, 76–77 (1971) (decided on Nov. 22, 1971).

257. *See, e.g.*, Brief for the Appellant at 5–15, Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973) (No. 72-1676) (on file with the National Archives at New York City) (making the rational basis argument); Brief for Plaintiffs-Appellants at 29–54, LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972) (No. 71-1598) (on file with the Western Reserve Historical Society in Women's Law Fund Records) (same); Brief for United Auto Workers as Amicus Curiae at 13, 17, *LaFleur*, 465 F.2d 1184 (No. 71-1598) (on file with the Western Reserve Historical Society in Women's Law Fund Records) (same); Brief for the Women's Equality Action League as Amicus Curiae at 11–15, *LaFleur*, 465 F.2d 1184 (No. 71-1598) (on file with the Western Reserve Historical Society in Women's Law Fund Records) (same); *Chesterfield* Plaintiff's Brief on the Merits, *supra* note 255, at 10–18 (same).

258. *See* sources cited *supra* notes 255–57 and accompanying text.

259. *See infra* notes 260–67 and accompanying text; *see also* Dinner, *supra* note 240, at 373–74 (noting that even courts that rejected the notion that pregnancy dismissal policies discriminated on the basis of sex often found them unconstitutional on rational basis review).

260. *See, e.g.*, *Green*, 473 F.2d at 632–37 (striking down mandatory maternity leave policy on rational basis review); Scott v. Opelika City Sch., 63 F.R.D. 144, 147–49 (M.D. Ala. 1974) (same); Aiello v. Hansen, 359 F. Supp. 792, 795–801 (N.D. Cal. 1973) (striking down exclusion of pregnancy from state disability benefits program on rational basis review), *rev'd sub nom.* Geduldig v. Aiello, 417 U.S. 484 (1974); Bravo v. Bd. of Educ., 345 F. Supp. 155, 156–59 (N.D. Ill. 1972) (striking down mandatory maternity leave policy on rational basis review), *rev'd* 525

although many decisions striking down discriminatory pregnancy policies also commented on their nature as sex discrimination, the relevance of such commentary in the context of a rational basis holding (the lowest standard of review, arguably applicable regardless of whether sex discrimination had occurred) was often far from clear.[261]

This ambiguity may have been viewed as non-ideal from the perspective of sex equality advocates, who wanted definitive precedent holding that pregnancy discrimination was sex discrimination *and* that sex discrimination was subject to strict scrutiny[262]—but there are reasons to think that it facilitated the ease with which judges reached agreement in the early pregnancy discrimination cases.[263] For example, in the case of *Green v. Waterford Board of Education*,[264] the three-judge panel agreed internally only that the policy was irrational—but not necessarily that it was sex discrimination.[265] And yet, the opinion's statements equating pregnancy discrimination with sex discrimination aroused little internal dissension—perhaps because such language was arguably dicta,

F.2d 695 (1975) (unpublished table decision); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 504–06 (S.D. Ohio 1972) (same); *Chesterfield*, 326 F. Supp. at 1160–61 (same).

261. *See* cases cited *supra* note 260. In some cases, the court's view of pregnancy as sex discrimination may nevertheless have played an important role, as some courts understood the expansion of rational basis review, *see supra* Part I, as extending only to the sex discrimination context, *see, e.g.*, *LaFleur*, 465 F.2d at 1188–89 (striking down policy as "arbitrary and unreasonable" under *Reed*—but unclear whether understood *Reed* to be the standard just for sex discrimination). But for courts who understood rational basis review to be robust even outside the sex discrimination context—a position embraced by many lower court judges during this time—a recognition of sex discrimination was arguably simply dicta. *See, e.g.*, *Aiello*, 359 F. Supp. at 796–97 (assuming that pregnancy discrimination is sex discrimination, and striking policy down under *Reed*, but also articulating the view that "*Reed* . . . mark[s] a general shift in the 'rational basis' test to a standard 'slightly, but perceptibly, more rigorous' " (quoting *Green*, 473 F.2d at 633) (citation omitted)).

262. *See, e.g.*, Dinner, *supra* note 240, at 396.

263. *See infra* notes 265–67 and accompanying text.

264. 473 F.2d 629 (2d Cir. 1973).

265. It is not entirely clear from internal records whether the judges in *Green* all agreed that the relevant policy should be characterized as sex discrimination—but it appears that at least one did not. *See, e.g.*, Memorandum from Judge J. Edward Lumbard, U.S. Court of Appeals for the Second Circuit, to Judge Wilfred Feinberg, U.S. Court of Appeals for the Second Circuit, re: Green v. Waterford Bd. of Educ., No. 72-1676, at 1 (Dec. 8, 1972) (on file with Columbia University, Rare Book & Manuscript Library, Wilfred Feinberg Collection, Box 47, Folder 16) (characterizing the equal protection problem as being the singling out of a particular illness for special treatment, and arguing that it was invalid on rational basis review); Memorandum from Judge J. Edward Lumbard, U.S. Court of Appeals for the Second Circuit, to Judge Wilfred Feinberg, U.S. Court of Appeals for the Second Circuit, re: Green v. Waterford Bd. of Educ., No. 72-1676, at 2 (Jan. 23, 1973) (on file with Columbia University, Rare Book & Manuscript Library, Wilfred Feinberg Collection, Box 47, Folder 16) (requesting—ultimately unsuccessfully—that Judge Feinberg remove a passage of the opinion characterizing pregnancy discrimination as discriminatory against women as "corny and unnecessary").

given the majority's application of rational basis review.[266] In other cases, courts simply concluded that the classification was irrational, expressly eschewing reliance on the notion that it was sex discrimination.[267] As such, rational basis arguments often offered courts a way out of grappling directly with the thorny question of sex discrimination's relationship to pregnancy.

Although many courts agreed that discriminatory pregnancy policies were constitutionally invalid (albeit on varying rationales), by 1973, a circuit split had developed. The Fourth Circuit, en banc, had concluded in the case of *Cohen v. Chesterfield County School Board*[268] that the mandatory maternity leave imposed by the defendant on teachers was constitutional, furthering legitimate school board interests.[269] The Sixth Circuit, in contrast, had held in *LaFleur v. Cleveland Board of Education*[270] that a very similar policy was unconstitutional because it was "arbitrary and unreasonable[.]"[271] As such, in the spring of 1973, the Court granted certiorari review in both *Chesterfield* and *LaFleur*, consolidating the two cases for argument.[272]

Rational basis arguments had been featured prominently in the lower court arguments in both *Chesterfield* and *LaFleur*—both sets of plaintiffs had argued not only for heightened scrutiny (based on both sex discrimination and fundamental rights arguments), but also for the invalidity of the mandatory maternity leave policies under rational basis review.[273] Indeed, between the two cases, the parties had developed a strong record, in which it had been shown that the identified purposes of the policies (such as continuity and health concerns) were at best unsupported, and often undermined, by the actual terms of the policies.[274] As such, both the plaintiffs and several of their amici pressed

266. *See Green*, 473 F.2d at 633–34; *see also* sources cited *supra* note 265 (discussing the internal deliberations in *Green*).

267. *See* Bravo v. Bd. of Educ., 345 F. Supp. 155, 157–59 (N.D. Ill. 1972), *rev'd* 525 F.2d 695 (1975) (unpublished table decision); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505, 507 (S.D. Ohio 1972).

268. 474 F.2d 395 (4th Cir. 1973) (en banc), *rev'd sub nom.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

269. *Id.* at 397–99.

270. 465 F.2d 1184 (6th Cir. 1972), *aff'd*, 414 U.S. 632 (1974).

271. *Id.* at 1188–89.

272. *See* Cleveland Bd. of Educ. v. LaFleur, 411 U.S. 947, 947 (1973) (mem.) (granting certiorari and consolidating the cases); Cohen v. Chesterfield Cty. Sch. Bd., 411 U.S. 947, 947 (1973) (mem.) (same).

273. *See* sources cited *supra* note 257.

274. *See generally* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–48 (1974) (discussing the evidence of the tenuous relationship between the policies and the reasons offered for them).

strongly in the lower courts that the policies simply failed to further any legitimate state interest.[275]

On appeal before the Supreme Court, both the *Chesterfield* and the *LaFleur* plaintiffs would—despite considerable changes in the law making heightened scrutiny arguments more plausible—continue to argue the rational basis point.[276] Although foregrounding arguments that sex discrimination warranted heighted scrutiny, and that fundamental rights were implicated, both sets of plaintiffs continued to contend that—even if rational basis review applied—they must prevail.[277] Asserting that *Reed v. Reed* established a rational basis standard "of general applicability[,]" the plaintiffs suggested that there must at least be a rational reason for differentiating pregnancy from other conditions causing temporary disabilities, and that the defendants had failed to show that such a reason existed.[278]

As the Justices debated *Chesterfield* and *LaFleur* internally, the importance of these rational basis arguments quickly became apparent.[279] Although a plurality of the Court had recently concluded in *Frontiero v. Richardson*[280] that sex discrimination warranted strict scrutiny, a majority of the Court continued to disagree with this

275. *See* sources cited *supra* note 257.

276. *See infra* notes 277–78 and accompanying text (detailing the plaintiffs' rational basis arguments). On the changing legal landscape vis-à-vis strict scrutiny, see generally Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973) (plurality opinion) (holding that sex is a suspect classification warranting strict scrutiny). The lower courts had also by this time become far more receptive to arguments for treating pregnancy discrimination as a form of sex discrimination. *See* Dinner, *supra* note 240, at 376–81.

277. *See, e.g.*, Brief for Petitioner at 24–29, *LaFleur*, 414 U.S. 632 (No. 72-1129) [hereinafter *Chesterfield* Brief for Petitioner] (showing the *Chesterfield* plaintiff's arguments); Brief for Respondents at 48–56, *LaFleur*, 414 U.S. 632 (No. 72-777) [hereinafter *LaFleur* Brief for Respondents] (showing the *LaFleur* plaintiffs' arguments).

278. *LaFleur* Brief for Respondents, *supra* note 277, at 48; *see also Chesterfield* Brief for Petitioner, *supra* note 277, at 24–29; *LaFleur* Brief for Respondents, *supra* note 277, at 48–56.

279. *See* Justice Harry A. Blackmun, Docket Sheet re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 1–2 (Oct. 19, 1973) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 175, Folder 1); Justice William J. Brennan, Docket Sheet re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 1–2 (undated) (on file with the Library of Congress in William J. Brennan, Jr. Papers, Box I:310, Folder 3); Justice William O. Douglas, Conference Notes re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 1–3 (Oct. 19, 1973) (on file with the Library of Congress in William O. Douglas Papers, Box 1625); Justice Lewis F. Powell, Jr., Docket Sheet re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 1–2 (Oct. 19, 1973) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers); *see also* MAYERI, *supra* note 86, at 90–92 (describing the internal deliberations in *LaFleur*).

280. 411 U.S. 677, 682–88 (1973) (plurality opinion).

approach.[281] Moreover, it rapidly became clear that few on the Court believed that pregnancy discrimination was properly characterized as sex discrimination as such.[282] Thus, it quickly became apparent in the Justices' deliberations that there was not a majority for a sex discrimination approach (with or without the application of heightened scrutiny).

Nevertheless, many of the Justices on the Court had serious concerns regarding the policies at issue in *LaFleur* and in *Chesterfield*.[283] Viewing such mandatory pregnancy leave policies as "arbitrary" and "irrational" in their singling out of pregnancy among all temporary disabilities, many of the Justices felt that the policies ought not to survive equal protection review.[284] Thus, initially, it seemed plausible that rational basis arguments might form the basis for the Court's invalidation of the mandatory maternity leave policies at issue in *Chesterfield* and *LaFleur*.[285]

But although rational basis arguments marked the most common point of agreement among the Justices,[286] ultimately it was decided that Justice Potter Stewart—who wished to resolve the case on irrebuttable presumption[287] grounds—would write.[288] Thus, the final majority opinion

281. *See* sources cited *supra* note 279; *see also* Justice Lewis F. Powell, Jr., Conference Notes re: Pregnant Teacher Cases, Nos. 72-777, 72-1129, at 1–2 (Oct. 17, 1973) [hereinafter Powell, *LaFleur* Notes] (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers).

282. *See* sources cited *supra* note 279; *see also* Dinner, *supra* note 240, at 397; Justice Harry A. Blackmun, Notes re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 1–2 (Oct. 15, 1973) [hereinafter Blackmun, *LaFleur* Notes] (on file with the Library of Congress in Harry A. Blackmun Papers, Box 175, Folder 1); *cf.* Powell, *LaFleur* Notes, *supra* note 280, at 1–2 (noting that the Court need not decide whether this was a sex classification given that rational basis was the appropriate standard).

283. *See infra* notes 283–84 and accompanying text.

284. *See* sources cited *supra* note 279; *see also* Blackmun, *LaFleur* Notes, *supra* note 281, at 2–5; *cf.* Powell, *LaFleur* Notes, *supra* note 280, at 6–9 (showing that Justice Powell initially believed that the *LaFleur* but not the *Chesterfield* policy failed rational basis review).

285. *See* sources cited *supra* note 283; *see also* MAYERI, *supra* note 86, at 91.

286. *See* MAYERI, *supra* note 86, at 91 (noting that Justice Blackmun proposed that the Court could avoid the " 'difficult analytical question[s]' associated with sex discrimination analysis by treating the leave policy as a traditional equal protection violation that lacked a rational basis, and the Justices seemed poised to do just that" (alteration in original) (quoting Memorandum from JBO, law clerk, to Justice Lewis F. Powell, Jr. re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 13 (Sept. 24, 1973) (on file with the Washington & Lee University School of Law in Lewis F. Powell, Jr. Papers))); *see also infra* note 293 and accompanying text (showing that Justice Stewart's "irrebuttable presumption" rationale was controversial among the Justices).

287. The "irrebuttable presumption" doctrine determined that the state violated principles of due process where a legislative classification rested on so-called "irrebuttable presumptions" regarding a particular class (in *LaFleur* and *Chesterfield*, the irrebuttable presumption that all women are incapacitated by pregnancy comparatively early in

largely situated the policies' constitutional wrong in the school district's categorical presumption of incapacity—allegedly a due process violation[289]—despite the fact that plaintiff's counsel in *LaFleur* had conceded never making such a due process claim.[290] Only Justice Powell fully embraced the rational basis argument in his final opinion,[291] arguing that the equal protection clause was violated where, as here, the policies "are either counterproductive or irrationally overinclusive" with regard to the government's legitimate interests.[292]

Although ultimately *LaFleur* and *Chesterfield* were thus decided on the basis of a legal argument orthogonal to *both* of the equal protection arguments raised by sex equality advocates, it soon became apparent that due process arguments would not provide a way of evading the equal protection dispute for long.[293] Even during the course of the *LaFleur* deliberations, several of the Justices had become increasingly uneasy with the opinion's due process irrebuttable presumption rationale.[294] Indeed, Justice Stewart himself, who authored the majority

pregnancy). *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644 (1974). Soon after *LaFleur*, incoherencies in the doctrine led to its early demise. *See infra* notes 293–94 and accompanying text.

288. *See* Letter from Justice William O. Douglas to Chief Justice Warren E. Burger re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 1 (Oct. 22, 1973) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) ("remind[ing]" the Chief Justice that at conference "it seemed to be the consensus" that *LaFleur* and *Chesterfield* should be assigned to Justice Stewart); *see also* Blackmun, *supra* note 279, at 1 (showing that Justice Stewart wished to resolve the case on irrebuttable presumption grounds); Brennan, *supra* note 279, at 1 (same).

289. *See LaFleur*, 414 U.S. at 644–48.

290. *See id.*; *cf.* Transcript of Oral Argument at 35, *LaFleur*, 414 U.S. 632 (Nos. 72-777, 72-1129) (making clear that counsel for plaintiffs in *LaFleur* conceded that a due process claim was not pled).

291. *Compare LaFleur*, 414 U.S at 653 (Powell, J., concurring) (holding the policies were invalid under a rational basis standard of review), *with id.* at 641–48 (Stewart, J., majority opinion) (analyzing claims on a rational basis standard but also holding an irrebuttable presumption is a violation of teachers' due process rights), *and id.* at 657–58 (Rehnquist, J., dissenting) (critiquing the irrebuttable presumptions doctrine, and indicating that the mandatory maternity leave policies should be affirmed). Note that although *LaFleur* is commonly understood exclusively as an irrebuttable presumption case today, significant parts of the majority's reasoning appeared to rely on a straightforward rational basis analysis. *See, e.g.*, *id.* at 643 (majority opinion) (concluding that "the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction"). Thus, although Powell was the only Justice to fully embrace an equal protection rational basis analysis, components of the majority's reasoning do also appear to rest on these grounds.

292. *Id.* at 653 (Powell, J., concurring).

293. *See infra* notes 293–94 and accompanying text.

294. *See, e.g.*, *LaFleur*, 414 U.S. at 651–53 (Powell, J., concurring) (expressing concerns about the majority's irrebuttable presumption rationale); Memorandum from RR, law clerk, re: Justice Powell's Concurrence in Maternity Leave Cases, Nos. 72-777, 72-1129, at 3 (Jan. 16,

opinion, would, shortly after *LaFleur*, declare that "*LaFleur* would be his last conclusive presumption case."[295] Thus, virtually immediately after *LaFleur*, it became clear that the irrebuttable presumption doctrine would not continue to provide a basis for evading the equal protection questions raised by pregnancy discrimination claims.

Sex equality advocates did not have to wait long for a case in which such questions again became the object of the Court's consideration.[296] Even before the decision in *LaFleur* was issued, *Geduldig v. Aiello*—a case within the Court's mandatory jurisdiction—came up to the Court and was granted full review.[297] Involving a state disability compensation statute that covered all long-term disabilities save pregnancy, *Geduldig* was a case in which the district court had invalidated the statute, applying rational basis review.[298] Like many of the early pregnancy discrimination cases, the role that sex discrimination arguments had played in the district court's decision in *Aiello* was ambiguous. Although the district court's opinion assumed that pregnancy discrimination was indeed sex discrimination, it also concluded that *Reed* and other early 1970s cases had generally altered the applicable standard of rational basis review.[299] As such, the Court rejected plaintiffs' arguments for strict or even intermediate scrutiny—but nevertheless concluded that even the lower, rational basis standard could not be met.[300]

1974) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 175, Folder 1) (displaying clerk's statement that "I have problems with the Stewart 'irrebuttable presumption' reasoning"—Justice Blackmun's handwritten notation appearing next to clerk's statement: "so *do* I"); Memorandum from Justice William O. Douglas to Justice Potter Stewart re: Cleveland Bd. of Educ. v. LaFleur, No. 72-777, and Cohen v. Chesterfield Cty. Sch. Bd., No. 72-1129, at 1 (Jan. 18, 1974) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 175, Folder 1) (noting that reading Powell's concurrence "stirs in me some of the doubts I had in *Vlandis*"—another irrebuttable presumption case—and thus declining to join the majority opinion, and instead concurring in the result).

295. *See* Justice William J. Brennan, Jr., Supreme Court of the United States Opinions of William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, October Term, 1973, at XIX (on file with the Library of Congress in William J. Brennan, Jr. Papers, Box II:6, Folder 17).

296. *Cf.* MAYERI, *supra* note 86, at 92 (noting that although "[t]he Court had sidestepped the central question of whether discrimination based on pregnancy was sex discrimination under the equal protection clause [in *LaFleur*,]" such sidestepping was "[n]ot for long" (citation omitted)).

297. 414 U.S. 1110 (1973) (mem.).

298. *See* Aiello v. Hansen, 359 F. Supp. 792, 796–801 (N.D. Cal. 1973), *rev'd sub nom.* Geduldig v. Aiello, 417 U.S. 484 (1974).

299. *Id.* at 796–97.

300. *Id.* at 796–801.

Initially, the arguments of plaintiffs' counsel on appeal to the Supreme Court closely tracked the district court's reasoning.[301] Making a motion to affirm the judgment, plaintiffs' counsel argued that *Reed* stated the appropriate standard, and that the district court had properly concluded that the pregnancy exclusion was "arbitrary" and "irrational."[302] Although also arguing that the pregnancy exclusion was a form of sex discrimination, the plaintiffs' primary arguments in their initial appellate briefs did not turn on the Court so holding.[303]

But once plenary review was granted, plaintiffs' arguments shifted. Arguing passionately that pregnancy discrimination marked the linchpin of contemporary sex discrimination, young attorney Wendy Webster Williams made the case strongly—and virtually exclusively—for considering pregnancy discrimination as a form of sex discrimination.[304] Treating *Reed* as a case specific to the sex discrimination context—and not as the "test applicable to 'all equal protection cases[,]' " as the district court had found[305]—Williams almost entirely abandoned any true rational basis argument for invalidity of the policy, opting to hitch her clients' fates exclusively to the sex discrimination argument.[306]

Despite Williams' arguments, the Justices were, in *Geduldig*, disinclined to revisit their very recent (but not publicly announced) determination in *LaFleur* that pregnancy discrimination was not a form of sex discrimination.[307] At conference, six of the Justices stated their view that the classification at issue was not sex discrimination.[308] And unlike the policies at issue in *LaFleur* and *Chesterfield*, few regarded the carve-out for pregnancy disabilities at issue in *Geduldig* as irrational.[309]

301. *See generally* Motion to Affirm, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640) (initial motion to affirm by plaintiffs closely tracking the district court's rational basis reasoning).

302. *Id.* at 9–16.

303. *Id.*

304. *See* Brief for Appellees at 28–52, *Geduldig*, 417 U.S. 484 (No. 73-640) [hereinafter *Geduldig* Appellees' Brief]; *see also* MAYERI, *supra* note 86, at 93 (discussing Wendy Webster Williams and the background of *Geduldig*).

305. *Aiello*, 359 F. Supp. at 796 (quoting Police Dep't v. Mosley, 408 U.S. 92, 95 (1972)).

306. *See, e.g.*, *Geduldig* Appellees' Brief, *supra* note 303, at 28–52.

307. *See infra* note 307 and accompanying text.

308. *See* Brennan, *supra* note 294, at XIX (describing the Justices' positions on the sex discrimination issue).

309. *See id.* at XVIII–XX. Developments under state law in California, which had led to the coverage of disabilities arising from abnormal pregnancies (but still not those arising from normal childbirth), may have made this conclusion easier for the Justices to reach. *See* Memorandum from Justice Harry A. Blackmun to the Conference re: Hansen v. Aiello, No. A-344, at 1–4 (Oct. 15, 1973) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 188) (describing the changes in state law since the filing of the case); Preliminary Memorandum from R., law clerk, re: Geduldig v. Aiello, No. 73-640, at 1 (Dec. 3, 1973) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers)

Because even the plaintiffs conceded that the inclusion of pregnancy disabilities in the program would radically increase the program's cost—requiring a reduction of benefits or an increase in the direct tax that funded the program[310]—the Justices generally viewed the exclusion as a rational one.[311]

The majority opinion in *Geduldig*—authored by Justice Stewart—reflected both of these conclusions. Although Justice Brennan argued in dissent that discrimination based on pregnancy "inevitably constitutes sex discrimination[,]"[312] the majority opinion in *Geduldig* dismissed this perspective summarily, concluding that pregnancy was not the same as "gender as such."[313] And, the majority also easily concluded that the exclusion furthered the state's "legitimate interests[,]" noting that the state could legitimately seek to preserve the low-contribution, high

(displaying law clerk's notation that "ectopic pregnancy or miscarriage exclusion may be irrational").

310. *Geduldig* Appellees' Brief, *supra* note 303, at 79–80. There were disputes about how much the addition of pregnancy to covered benefits would cost the program, but even plaintiffs' reduced estimate was that the addition of pregnancy would cause a twelve percent increase in the cost of the program. *See id.* at 88–89.

311. *See* Justice Lewis F. Powell, Jr., Docket Sheet re: Geduldig v. Aiello, No. 73-640, at 1–2 (Mar. 29, 1974) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) (showing that Justices Stewart and Powell expressly stated their views at conference that the classification was "rational" and that Justices White and Rehnquist expressed agreement with those Justices' views); Justice Harry A. Blackmun, Draft Concurrence re: Geduldig v. Aiello, No. 73-640, at 2 (undated) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 188) (expressing the view in an unpublished draft concurrence that the plan as modified was "based totally on legitimate and rational economic realities"). *See generally* Geduldig v. Aiello, 417 U.S. 484, 494–96 (1974) (showing six Justices joining majority opinion expressing the view that the exclusion need only be "rationally supportable" and that the state had "legitimate" and non-"invidious" reasons for the exclusion of regular pregnancy). This no doubt reflected at least in part the Justices' general disinclination to tinker with social welfare line drawing. *See, e.g.*, Justice Lewis F. Powell, Jr., Certiorari Docket Sheet re: Geduldig v. Aiello, No. 73-640, at 1 (Dec. 14, 1973) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) (Powell recording Stewart as having said that "this is a funded insurance plan which is different from *Reed* v. *Reed* [and] *Preg. Teachers* Case. Calif[.] Ct[.] was wrong.").

312. *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting).

313. *Id.* at 496 n.20 (majority opinion). The original draft opinion by Justice Stewart had no mention of the sex discrimination issue at all, but he later amended the opinion to discuss it summarily, after Brennan circulated his dissent, "forc[ing] the issue." *See* Brennan, *supra* note 294, at XIX–XX. Note that this footnote in the *Geduldig* opinion, which refers to *Reed* as being a case "involving discrimination based upon gender as such[,]" *Geduldig*, 417 U.S. at 496 n.20 (citing Reed v. Reed, 404 U.S. 71 (1971)), could be read to signal that the Court by this juncture was settled on an approach that treated *Reed* as a case distinctively about sex discrimination, rather than an application of rational basis review. In fact, this issue remained unsettled on the Court for some time. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 554–64 (discussing disputes over whether *Reed* was properly characterized as a rational basis case continuing through the end of the 1975 Term).

benefits nature of the program by excluding a particularly expensive category of disability claims.[314]

Ultimately, no Justice would make an argument for the rational basis invalidity of the pregnancy exclusion in *Geduldig*, with the dissent focusing exclusively on the argument that sex discrimination triggered strict scrutiny and the majority finding the program rational.[315] And thus, although many courts during the same era—both before and after *Geduldig*—found other forms of pregnancy discrimination to be invalid on rational basis review, this history would largely be forgotten.[316] Nor would the Justices' internal debates in *LaFleur*—which suggested that many of the Justices perceived the pregnancy discrimination in that case to violate rational basis review—become known until much later.[317] As such, heightened scrutiny—and the equation of pregnancy with sex discrimination—would come to be understood by the canon as key to constitutional pregnancy discrimination claims.[318]

But while the constitutional canon would forget the role of "protected class rational basis review" in early pregnancy litigation efforts, the impacts of those efforts would nevertheless endure. Sex equality advocates' early work making protected class rational basis arguments—leading courts to reject the rationality of distinguishing pregnant women from others with temporary disabilities—would help generate enduring shifts in perceptions of the fairness and legitimacy of singling out pregnancy for disfavor.[319] By the time the Court extended its constitutional holding in *Geduldig*—that pregnancy discrimination was not a form of sex discrimination—to Title VII in 1976, this perspective would be sufficiently entrenched such that Congress would swiftly respond with legislative action, protecting public and private employees

314. *See Geduldig*, 417 U.S. at 494–97.

315. *See generally id.* (showing no Justice made a rational basis argument for the program's invalidity).

316. *See infra* note 317 and accompanying text. For cases invalidating pregnancy discrimination on rational basis review before *Geduldig*, see, for example, sources cited *supra* note 260. For sources doing so after *Geduldig*, see, for example, Cook v. Arentzen, 14 Fair. Emp. Prac. Cas. (BNA) 1643, 1977 WL 4327, at *3 (4th Cir. May 6, 1977), *vacated*, 582 F.2d 870 (4th Cir. 1978) (invalidating pregnancy discrimination on rational basis review); Crawford v. Cushman, 531 F.2d 1114, 1121–24 (2d Cir. 1976) (same).

317. *Cf. supra* notes 289–91 and accompanying text (noting that in the final opinions, only Justice Powell clearly embraced the rational basis/equal protection rationale).

318. *See, e.g.*, MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 1416 (2d ed. 2013) (characterizing *Geduldig* as having held "that the Equal Protection Clause governs classifications based on sex itself *and does not apply*—absent evidence of intent to discriminate—to classifications that only have a disparate impact on men and women" (emphasis added)).

319. *See* sources cited *supra* note 36.

alike.[320] Therefore, although the memory of protected class rational basis review would largely be erased, the legal changes it helped to bring about would be enduring.

B. Intersectional Discrimination and Rational Basis Review (1967–1976)[321]

Although pregnancy discrimination issues were among the most common of the boundary disputes raised by early sex discrimination litigation, they were not the first. Indeed, even before *Reed v. Reed* afforded sex equality advocates their first major constitutional victory, claims at the intersection of gender, race, and other axes of subordination were increasingly being heard in the federal courts.[322] Brought by a diverse array of social movement actors (including not only women's rights organizations but also race and poverty litigators), such cases squarely raised fundamental questions regarding how to constitutionally assess policies that targeted African American women—policies that also often implicated poverty, nonmarital children, and fundamental rights.[323]

Many of these early intersectional cases not only raised questions of how to address the intersection of diverse claims surrounding rights and protected class status, but also raised the type of disparate impact issues that were increasingly provoking disputes more broadly in constitutional anti-discrimination law.[324] Thus—while it was sometimes obvious that black women had been targeted qua black women—it was as often only by impact that such arguments could be made.[325] As such, as Serena

320. *See* sources cited *supra* note 36.

321. Although, for the purposes of narrative structure, this Article includes the discussion of intersectional claims here in the context of sex discrimination, they could equally be classified as racial justice claims.

322. Serena Mayeri's work has uncovered the rich variety of intersectional claims brought by race, sex, and anti-poverty litigators during this era. For a much fuller account of such claims, see generally MAYERI, *supra* note 86; Mayeri, *supra* note 57.

323. *See* sources cited *supra* note 57; sources cited *infra* note 327.

324. *See, e.g.*, Brief of Plaintiff-Appellees and Plaintiff-Appellants at 59–60, 74–77, Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975) (Nos. 73-2226, 73-2227) (on file with the Western Reserve Historical Society in Women's Law Fund Records) [hereinafter *Troyan* Brief of Plaintiff-Appellees and Plaintiff-Appellants]; Brief of Defendants at 16–17, Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967) (No. 2495-N) (on file with the Library of Congress in Frank M. Johnson Papers, Box 46); *see also infra* notes 402–03 and accompanying text (noting that many of the Justices perceived the race discrimination issue in *Drew Municipal Separate School District v. Andrews* as a disparate impact issue).

325. Often, as is also common today, the record in the cases was suggestive of intentional discrimination, but judges were unreceptive to such suggestions. *See, e.g.*, Supplemental Brief of Respondents at 1–4, Drew Mun. Separate Sch. Dist. v. Andrews, 425 U.S. 559 (1976) (mem.) (per curiam) (No. 74-1318) [hereinafter *Drew* Supplemental Brief of Respondents]

Mayeri has put it, many of the early cases challenging forms of intersectional discrimination " 'bristle[d] with constitutional issues of broad importance,' all of them thorny."[326]

Despite presenting a complicated set of issues, and relating to arenas of discrimination that are today thought of as difficult to reach, early cases brought at the intersection of race and gender subordination were often (albeit not always) successful.[327] And, where such claims prevailed, they often did so on rational basis review.[328] Thus, as in numerous other contexts, resorting to meaningful rational basis review allowed courts and litigants to avoid the complexities of defining the contours of the "gatekeeping" standards to heightened scrutiny.[329] Although the Supreme Court's avoidance of such intersectional rational basis arguments in the major cases in which they were raised on appeal would largely render these arguments invisible, they continued to persist in the lower courts through the era of robust rational basis review.[330]

King v. Smith,[331] brought in district court in 1966 by anti-poverty and civil rights litigators,[332] demonstrated the potential of such rational

(documenting evidence suggesting that the ban on employment of those with nonmarital children at issue in *Drew* was part of a wider effort to reduce the ranks of black teachers incident to faculty desegregation); *cf. infra* notes 401–03 and accompanying text (showing that none of the Justices—not even Justices Marshall or Brennan—were receptive to the race discrimination argument in *Drew v. Andrews*).

326. *See* MAYERI, *supra* note 86, at 163 (alteration in original) (quoting Brief Amicus Curiae for the National Education Association at 7, Drew Mun. Separate Sch. Dist. v. Andrews, 423 U.S. 820 (1975) (No. 74-1318)) (describing the case of *Drew v. Andrews*).

327. *See* cases cited *infra* note 327.

328. *See, e.g.*, Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27, 31–35 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976) (mem.) (per curiam); Smith v. City of E. Cleveland, 363 F. Supp. 1131, 1137–44 (N.D. Ohio 1973), *aff'd in part, rev'd in part sub nom.* Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975); *King*, 277 F. Supp. at 38–41; *see also* Cirino v. Walsh, 321 N.Y.S.2d 493, 494 (Sup. Ct. 1971). In addition, as Serena Mayeri has observed, the plaintiffs in the early illegitimacy cases—many of which were successfully litigated at the Supreme Court on rational basis review—were all African American women and their children. *See* Mayeri, *supra* note 57, at 1281.

329. *See generally* sources cited *supra* note 327 (showing that judges' reliance on rational basis review allowed them to sidestep questions of how to characterize intersectional forms of discrimination, and whether such discrimination triggered heightened review).

330. *See generally* sources cited *supra* note 327 (demonstrating the persistence of intersectional race and gender rational basis arguments in the lower courts).

331. 277 F. Supp. 31 (M.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968).

332. *See* Complaint at 12, *King*, 277 F. Supp. 31 (No. 2495-N) (on file with the Library of Congress in Frank M. Johnson Papers, Box 46) (showing attorneys involved in the case in the signature block); *see also* David Margolick, *Edward Sparer, 55; Legal Advocate for Poor*, N.Y. TIMES, June 25, 1983, at 14 (describing Sparer's long career as an anti-poverty lawyer); Obituary, *Howard Thorkelson*, PENNLIVE.COM (March 6, 2011), http://obits.pennlive.com/obituaries/pennlive/obituary.aspx?pid=149110758 [https://perma.cc/287T-AUN9] (describing Thorkelson's long career as an anti-poverty lawyer); Sam Roberts, *Alvin Bronstein, Lawyer*

basis approaches early on.[333] Presenting a challenge to Alabama's "substitute father" rule (barring receipt of Aid to Dependent Children ("ADC") benefits where a mother was believed to be "cohabit[ing]" or having a sexual relationship outside of marriage),[334] the restriction at issue in *King* was one of a number of welfare rules in the South that overwhelmingly impacted poor black women.[335] Intended to control welfare recipients' sexuality—and also arguably to ensure that African American women would remain available as low-wage labor—such rules presented clear issues of race and gender injustice.[336] But, although it appeared that discriminatory motives may have underlain them, it was not clear that such policies could be proven to be intentionally discriminatory.[337] Moreover, several of the forms of discrimination arguably implicated by cases such as *King*—such as sex, illegitimacy and morals-based discrimination—did not, at the time, clearly implicate any form of heightened review under the courts' existing precedents.[338]

Who Fought Prison Abuse, Dies at 87, N.Y. TIMES (Oct. 29, 2015), https://www.nytimes.com/2015/10/30/us/alvin-bronstein-lawyer-who-fought-prison-abuse-dies-at-87.html [https://perma.cc/2CKT-3SPW] (describing Bronstein's long civil rights career); Sam Roberts, *Donald Jelinek, Lawyer for Attica Prisoners, Dies at 82*, N.Y. TIMES (July 3, 2016) https://www.nytimes.com/2016/07/04/nyregion/donald-jelinek-lawyer-for-attica-prisoners-dies-at-82.html [https://perma.cc/N6T3-97E4] (describing Jelinek's long civil rights career).

333. *See King*, 277 F. Supp. at 38–41.

334. *See* Social Security Act of 1935, Pub. L. No. 74-241, 49 Stat. 620 (repealed in part 1996). Although cohabitation was the term used in the rule, in fact the rule was targeted at any situation in which an ADC-receiving mother was having a sexual relationship with a man. *See King*, 277 F. Supp. at 39; Plaintiffs' Trial Brief of Fact and Law at 2, 55–56, *King*, 277 F. Supp. 31 (No. 2495-N) [hereinafter *King* Plaintiffs' Trial Brief] (on file with the Library of Congress in Frank M. Johnson Papers, Box 46).

335. *See* sources cited *infra* notes 335–36.

336. *See, e.g.*, MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 323–27 (1988); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 138–45 (1971); Rickie Solinger, *The First Welfare Case: Money, Sex, Marriage, and White Supremacy in Selma, 1966, A Reproductive Justice Analysis*, 22 J. WOMEN'S HIST. 13, 14–15 (2010); *see also* Brief for Appellees at 22–28, King v. Smith, 392 U.S. 309 (1968) (No. 949) [hereinafter *King* Appellees' Brief].

337. *King* provides an excellent example of this. There was ample evidence of racial impact in *King*—and gender-based impact, although that was taken for granted and not argued. *See, e.g.*, *King* Appellees' Brief, *supra* note 335, at 22–28. But the evidence of discriminatory purpose in *King* was at least somewhat more ambiguous. *See id.*; *see also* Reply Brief for Appellants at 28–29, *King*, 392 U.S. 309 (No. 949) (setting out defendants' response to plaintiffs' arguments that the regulation was purposefully discriminatory).

338. As to sex and illegitimacy discrimination, the Court had yet to begin its trajectory of deciding such cases favorably, even on rational basis review. *See generally* Eyer, *Constitutional Crossroads*, *supra* note 1 (discussing the early development of sex and illegitimacy doctrine in the Supreme Court). And while cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), offered some basis for challenging morals-based laws in private domains, *id.* at 484–86, it was not until *Eisenstadt v. Baird*, 405 U.S. 438 (1972), that the Court held that those privacy rights might reach unmarried individuals, *id.* at 453–55.

Of course, at the time that *King* was brought in the lower courts, the move toward robust rational basis review that would develop in the 1970s also had not yet begun.[339] Nevertheless, the plaintiffs' attorneys—building on a decades-long legacy of intra-agency constitutional lawmaking—argued that the policy failed rational basis review.[340] While acknowledging that "neither the United States nor the Alabama Constitutions appear to require Alabama to grant financial assistance to needy, dependant [sic] children[,]"[341] they nonetheless forcefully contended that "once Alabama undertakes to provide a statutory program of assistance it must do so in conformity with the constitutional mandate of equal protection."[342] And that mandate, according to the plaintiffs, demanded that

> Alabama cannot pick and choose the mothers and children it will aid in a whimsical or capricious manner; it cannot exclude needy children from the program on an arbitrary or irrational ground; it cannot classify some children as eligible and others as ineligible without a reasonable basis for distinguishing one class from the

339. *See generally supra* Part I (describing the rise of robust rational basis review in the 1970s). *But see* Rinaldi v. Yeager, 384 U.S. 305, 308–11 (1966) (applying a meaningful form of rational basis review in the mid-1960s)

340. *King* Plaintiffs' Trial Brief, *supra* note 333, at 52–62. For a fascinating and extended discussion of this "administrative equal protection" advocacy, see generally Tani, *supra* note 57, at 844–59 (discussing the role of the Social Security Administration in the development of rational basis arguments for restraining discriminatory ADC policies). As Karen Tani documents, legal theories developed at the Social Security Administration had, for many decades, suggested that state requirements lacking a rational relationship to the purposes of ADC to provide for indigent children were constitutionally invalid. *Id.* There are reasons to believe that the attorneys—and the courts—in *King* were influenced by this legacy of "administrative equal protection." *See id.* at 885–89 (discussing *King*); *id.* at 867–73 (describing more generally the role of administrative equality protection in the history of agency efforts to rein in moralistic state rules, like "suitable home" rules); *see also King* Plaintiffs' Trial Brief, *supra* note 333, at 20–46 (discussing extensively the agency's position regarding morals qualifications for ADC, including the agency's view that, for example, illegitimacy penalties "raise[d] a question of reasonable classification," an allusion to the history of robust rational basis review in the agency's practice); Plaintiffs' Reply Brief at 10, *King*, 277 F. Supp. 31 (No. 2495-N) [hereinafter *King* Plaintiffs' Reply Brief] (on file with the Library of Congress in Frank M. Johnson Papers, Box 46, Folder 6) (same, and specifically characterizing the agency's "Flemming Ruling" as resting on an " 'equal protection' rationale" that "strongly supports Plaintiffs' constitutional argument in this case").

341. *King* Plaintiffs' Trial Brief, *supra* note 333, at 5. Reflecting the rapidly changing backdrop of anti-poverty litigation, this concession would be abandoned by the time *King* went up on appeal, with the plaintiffs suggesting in the Supreme Court that there is "[a] persuasive argument that the needy have a *right* to receive welfare aid" under the Constitution. *See King* Appellees' Brief, *supra* note 335, at 34 & n.23.

342. *King* Plaintiffs' Trial Brief, *supra* note 333, at 5.

> other; it may only create classifications which are rationally related to the purpose of the federal and Alabama statutes.[343]

Because the Alabama rule denied benefits to children on grounds unrelated to the purposes of the ADC program, and indeed contrary to them, it failed this standard.[344]

The plaintiffs also raised other arguments for the rule's invalidity, including its racial impact and purpose, its inconsistency with the requirements of the federal statute, and its impermissible burdening of mothers' privacy rights.[345] But the three-judge district court panel would opt to ground its decision squarely on the plaintiffs' rational basis arguments.[346] Mirroring the plaintiffs' reasoning nearly verbatim, the court held that although

> there is no vested legal right . . . to receive public financial assistance . . . , once Alabama undertakes to [do so], it must do so in conformity with the constitutional mandate of equal protection. Alabama cannot pick and choose the mothers and children it will aid through the use of some classifications which are not rationally related to the purpose of the applicable statutes.[347]

Concluding that the Alabama regulation was just such "an arbitrary and discriminatory classification[,]" denying benefits "for reasons unrelated to and in conflict with the purposes of [the welfare laws,]" the Court deemed it to be unconstitutional.[348]

On appeal before the Supreme Court, the plaintiffs continued to vigorously press the rational basis argument.[349] Suggesting that "[i]t would be arbitrary and irrational . . . to infer that the [substitute] father [i.e., the man with whom the mother was having sexual relations] is providing parental care and support[,]" the plaintiffs argued that the substitute father regulation thus contravened the plain purpose of the Act—to provide support to all needy children.[350] Noting that the other arguments offered by the state fared no better in terms of their rationality, the plaintiffs contended that under either of the Court's

343. *Id.*

344. *Id.* at 53–61.

345. *See generally id.* (making a number of other arguments in addition to the rational basis argument); *King* Plaintiffs' Reply Brief, *supra* note 339 (same).

346. *See infra* text accompanying notes 346–47.

347. King v. Smith, 277 F. Supp. 31, 40 (M.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968) (citations omitted).

348. *Id.* at 41.

349. *See King* Appellees' Brief, *supra* note 335, at 34–46.

350. *Id.* at 38–40.

applicable standards of review (strict scrutiny[351] or reasonable relation), the Alabama substitute father regulation must fail.[352] The plaintiffs also reiterated a number of other constitutional arguments—not relied on by the district court below—urging the Justices that both procedural and substantive due process concerns were implicated by the intrusive, vague, and standardless investigations of welfare recipients that the regulation invited.[353]

But while the plaintiffs in *King* focused their arguments on appeal almost exclusively on constitutional grounds (including the statutory argument only as a component of the rational basis argument), several of the Justices preferred a different approach.[354] Perhaps drawing on the arguments put forward in an amicus brief filed by the NAACP and a variety of welfare organizations—which extensively made the statutory argument[355]—a number of Justices pressed the parties at oral argument on whether the case might be resolved on statutory grounds.[356] Martin Garbus, the plaintiffs' attorney, assured the Justices that indeed the case could be so resolved, as the Alabama rule contravened both the purposes of the federal Act and its definition of the term "parent."[357]

At conference, although several of the Justices expressed receptivity to the equal protection argument, a majority expressed the

351. On appeal, plaintiffs-appellees' brief argued for strict scrutiny based on a number of arguments including, *inter alia*, racial discrimination, and arguments for applying heightened scrutiny to illegitimacy penalties. *See id.* at 23–27, 40–41.

352. *See id.* at 34–46. Although the plaintiffs' attorneys had argued the rational basis point below exclusively in terms of equal protection (although they also made separate due process arguments), on appeal, the plaintiffs' rational basis argument included both equal protection- and due process-based reasoning. *See id.*; *cf.* Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of the NAACP Legal Defense & Educational Fund, Inc., the National Office for the Rights of the Indigent, & the Center on Social Welfare Policy & Law at 26–36, King v. Smith, 392 U.S. 309 (1968) (No. 949) [hereinafter *King* LDF and Welfare Rights Amicus Brief] (making the rational basis argument purely as a matter of equal protection doctrine); Motion of the Child Welfare League of America, Inc. & the National Council of Churches of Christ in the U.S.A. *Amici Curiae*, Supporting the Position of the Appellees at 6–13, *King*, 392 U.S. 309 (No. 949) (making both the due process rational basis argument and the equal protection rational basis argument, but separating them out).

353. *King* Appellees' Brief, *supra* note 335, at 47–65.

354. *Compare id.* at 34–81 (framing arguments for invalidity of Alabama's substitute father regulation in terms of the Constitution), *with infra* notes 357–59 and accompanying text (describing the Justices' preference for a statutory ruling).

355. *See King* LDF and Welfare Rights Amicus Brief, *supra* note 351, at 12–26; *see also* Bench Memorandum from CHW, law clerk, re: King v. Smith, No. 949, at cover, 20–21 (Apr. 18, 1968) (on file with the Library of Congress in Earl Warren Papers, Box 316, Folder 5) (showing that the statutory argument was made solely in the amicus briefs, and including Warren's handwritten notation: "Supremacy or on statute").

356. *See, e.g.*, Oral Argument at 18:50, 27:15, *King*, 392 U.S. 309 (No. 949), https://www.oyez.org/cases/1967/949 [https://perma.cc/RR9Q-MNAR (staff-uploaded archive)].

357. *Id.* at 39:37.

view that the decision should be "on the Statute."[358] Ultimately, the majority opinion would decline to reach the constitutional issue, holding instead that Alabama's regulation was inconsistent with the federal statutory scheme.[359] Thus, the Court concluded, "Alabama's substitute father regulation . . . [is] invalid because it defines 'parent' in a manner that is inconsistent with . . . the Social Security Act."[360]

As Karen Tani has observed, this framing of the majority opinion in *King* as a purely statutory opinion has largely obscured *King* as a constitutional precedent.[361] But, as she persuasively argues, there are reasons to believe that even the Justices' statutory holding may not in fact have been so divorced from constitutional precepts as it might initially seem.[362] As Justice Douglas's law clerk noted in an internal memorandum in *King*,

> HEW imposes only one condition on [the ability of the states to impose more stringent eligibility requirements for ADC than set forth in the federal Act], which it terms Condition X, which provides that state plans will be approved . . . "only if the classification effecting such limitation is a rational one in light of the purposes of public assistance programs."[363]

358. Justice Thurgood Marshall, Docket Sheet re: King v. Smith, No. 949, at 1–2 (Apr. 26, 1968) (on file with the Library of Congress in Thurgood Marshall Papers, Box 541, Folder 4). Justices Douglas, Marshall, and Fortas were all receptive to the equal protection argument, with Douglas and Marshall believing it should be the basis for the opinion. *See* Justice William J. Brennan, Jr., Docket Sheet re: King v. Smith, No. 949, at 1–2 (undated) (on file with the Library of Congress in William J. Brennan, Jr. Papers, Box I:161, Folder 2); Marshall, *supra*, at 1; Justice William O. Douglas, Conference Notes re: King v. Smith, No. 949, at 1–2 (Apr. 26, 1968) (on file with the Library of Congress in William O. Douglas Papers, Box 1426); Justice Earl Warren, Docket Sheet re: King v. Smith, No. 949, at 1 (Apr. 26, 1968) (on file with the Library of Congress in Earl Warren Papers, Box 384, Folder 3). In addition, although by conference Chief Justice Warren argued for a statutory approach, he too apparently believed originally that the case could go on constitutional grounds. *See* Memorandum from CHW, law clerk, re: King v. Smith, No. 949, at 1 (Jan. 8, 1968) (on file with the Library of Congress in Earl Warren Papers, Box 316) (showing in response to summary by clerk that mentioned only constitutional arguments for affirmance, a handwritten notation by Earl Warren: "Affirm"). Ultimately, only Justice Douglas would write separately to make the equal protection/rational basis argument. *See King*, 392 U.S. at 334–36 (Douglas, J., concurring).

359. *See King*, 392 U.S. at 333 (majority opinion) (declining to reach the constitutional issue and instead basing the holding on the statutory grounds).

360. *Id.*

361. Tani, *supra* note 57, at 884–89.

362. *Id.*; *see also infra* notes 362–64 and accompanying text.

363. *See* Supplemental Memorandum from WAR, law clerk, to Justice William O. Douglas re: King v. Smith, No. 949, at 1 (Jan. 15, 1968) (on file with the Library of Congress in William O. Douglas Papers, Box 1426) (quoting Alanson W. Willcox, Gen. Counsel, Dep't of Health, Educ. & Welfare, Memorandum Concerning Authority of the Secretary, Under Title IV of the Social Security Act, to Disapprove Michigan House Bill 145 on the Ground of Its

As Tani's work has demonstrated, Condition X derived from the agency's long tradition of applying a meaningful form of rational basis review to state requirements.[364] Thus, although the agency had, by the late 1960s, reimagined the basis for policing state requirements as residing in the statute itself—an approach the Court itself followed in *King*—the origins of such an approach lay in administrative constitutional interpretation, and in rational basis review.[365]

Despite these rational basis underpinnings, the framing of *King* as a statutory precedent would mean that it would not become a part of the rational basis canon or even the wider constitutional canon.[366] Nevertheless, other precedents, explicitly relying on rational basis review, would soon make the rational basis argument for invalidating intersectional discrimination an even stronger one.[367] Thus, as the decade turned, organizations litigating on behalf of plaintiffs facing multiple forms of subordination would continue to draw on rational basis arguments to make intersectional claims, often relying on early 1970s rational basis precedents such as *Reed v. Reed*, *Eisenstadt v. Baird*,[368] and *Weber v. Aetna*.[369]

But rational basis arguments were not the only arguments gaining strength during the early 1970s. Heightened scrutiny arguments, including arguments for heightened scrutiny of sex discrimination and of invasive morals discrimination, were also gaining traction during this

Limitations on Eligibility 1 (Mar. 25, 1963) (on file with Professor Karen Tani)) (citation omitted).

364. *See* Tani, *supra* note 57, at 880–81, 887–88.

365. *See id.* at 880–81, 885–89.

366. *But see id.* at 885–89 (uncovering *King*'s roots in administrative constitutionalism).

367. *See generally* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (applying a meaningful form of rational basis review to invalidate illegitimacy discrimination); Reed v. Reed, 404 U.S. 71 (1971) (applying a meaningful form of rational basis review to invalidate sex discrimination).

368. 405 U.S. 438 (1972).

369. *See, e.g.*, *Troyan* Brief of Plaintiff-Appellees & Plaintiff-Appellants, *supra* note 323, at 45–54; Plaintiffs' Memorandum of Law in Support of the Motion for Preliminary Injunction at 9, Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27 (N.D. Miss. 1973) (No. GC 73-20-S) (on file with the Mississippi State University Congressional and Political Research Center in William C. Keady Papers) [hereinafter *Drew* Plaintiffs' Preliminary Injunction Brief]; Brief of Amicus Curiae, the Center for Constitutional Rights at 26–31, *Drew*, 371 F. Supp. 27 (No. GC 73-20-S) (on file with the Mississippi State University Congressional and Political Research Center in William C. Keady Papers) [hereinafter *Drew* CCR Trial Amicus Brief]; Plaintiffs' Supplemental Memorandum of Law in Support of the Motion for Preliminary Injunction at 6–9, *Drew*, 371 F. Supp. 27 (No. GC 73-20-S) (on file with the Mississippi State University Congressional and Political Research Center in William C. Keady Papers) [hereinafter *Drew* Plaintiffs' Supplemental Memorandum]. For a general discussion of *Reed*, *Weber*, and the other early 1970s rational basis precedents that created the possibility of making such arguments, see *supra* Part I.

same time frame.[370] As such, as the mid-point of the decade approached, there were a considerable array of arguments which advocates could and did deploy to attack intersectional forms of discrimination.[371] Addressing a variety of measures that targeted African American women—and that often also targeted poor women raising nonmarital children—advocates raised both heightened scrutiny and rational basis arguments together in challenging the constitutionality of state discrimination.[372]

The trial proceedings in the case of *Andrews v. Drew Municipal Separate School District*[373] illustrated the diverse approaches that advocates had embraced in litigating intersectional claims by the early 1970s.[374] In *Drew*, a local school district had, following court-ordered desegregation,[375] imposed a rule barring teachers and teacher aides from employment when they were the parents of nonmarital children.[376] In practice, all of those "denied jobs under the policy were African American women."[377] Under this rule, Katie Mae Andrews and several other teachers and teacher aides had—despite being otherwise qualified—been denied employment or terminated.[378]

370. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973) (plurality opinion) (concluding that sex discrimination warranted strict scrutiny); *see also* Roe v. Wade, 410 U.S. 113, 151–66 (1973) (extending the due process right to privacy).

371. *See infra* notes 378–86 and accompanying text; *see also* 1 Trial Transcript at 21–22, Smith v. City of E. Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973) (No. C 73-299) (on file with the Western Reserve Historical Society in Women's Law Fund Records); *Troyan* Brief of Plaintiff-Appellees & Plaintiff-Appellants, *supra* note 323, at 38–45; Reply Brief of Plaintiff-Appellees & Plaintiff-Appellants at 9–14, *Troyan*, 520 F.2d 492 (Nos. 73-2226, 73-2227) (on file with the Western Reserve Historical Society in Women's Law Fund Records); Petition for a Writ of Certiorari at 9–18, Smith v. Troyan, 426 U.S. 934 (1976) (mem.) (No. 75-734).

372. *See* sources cited *supra* note 370.

373. Serena Mayeri has extensively described the context, history, and relevance of *Drew*. For a much fuller and fascinating account of the case see MAYERI, *supra* note 86, at 145–67; Mayeri, *supra* note 57, at 1316–23.

374. *See infra* notes 374–86 and accompanying text.

375. As Serena Mayeri notes, like many of the other policy determinations that followed on the heels of court ordered desegregation, there are considerable reasons to believe that this policy was a response to such desegregation. *See, e.g.*, MAYERI, *supra* note 86, at 146.

376. *See* Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27, 29 (N.D. Miss. 1973) (mem.). Although the rule ostensibly applied to all non-married parents, in fact it was applied exclusively (and categorically) to those who were the parents of nonmarital children. *See id.* at 29 n.3.

377. MAYERI, *supra* note 86, at 150; *see also Drew* CCR Trial Amicus Brief, *supra* note 368, at 12–17 (describing the rule's discriminatory purposes and effects as to women and racial minorities); MAYERI, *supra* note 86, at 146–51 (further detailing the relationship of the rule to backlash against civil rights).

378. *See* MAYERI, *supra* note 86, at 146.

In arguing against the policy, Andrews's attorney, Victor Charles McTeer, placed rational basis review at the center of his arguments.[379] Thus, he contended, "[I]t is clear that a classification whether based on race, sex or single parent status must never be fanciful, capricious, arbitrary or unatural [sic]; but rather any classification must be natural and have a rational basis."[380] Moreover, he further argued, "[t]he distinctive classification herein is not only unreasonable and unconstitutional but serves no viable purpose."[381] Thus, he suggested, regardless of whether heightened scrutiny was triggered, the policy failed rational basis review.[382]

But McTeer and his amici—noting the many rights and statuses implicated by the policy—also raised a diverse array of arguments for heightened scrutiny as well.[383] Noting that the policy acted exclusively against African American women, McTeer argued that under the policy "black women are [distinctively] denied their right to employment without discrimination in violation of the Fourteenth Amendment" and thus the defendant ought to be required to "bear[] a very heavy burden of justification."[384] McTeer and his amici also suggested that in targeting single parents, the rule impermissibly burdened the right to "raise one's children"[385] and to engage in "procreative choice,"[386] among the "basic civil rights of man[.]"[387] Thus, the district court would have before it a host of possible arguments in favor of the policy's invalidity.

379. *See Drew* Plaintiffs' Preliminary Injunction Brief, *supra* note 368, at 9–14 (asserting, in plaintiffs' leading brief, the rational basis argument as the primary argument).

380. *Id.* at 9 (emphasis omitted).

381. *Id.* at 11.

382. *See supra* notes 378–80 and accompanying text; *see also Drew* Plaintiffs' Preliminary Injunction Brief, *supra* note 368, at 9–14; *Drew* Plaintiffs' Supplemental Memorandum, *supra* note 368, at 4–7; *Drew* CCR Trial Amicus Brief, *supra* note 368, at 20–31; Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiffs' Motion for Preliminary Injunction at 7–11, Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27 (N.D. Miss. 1973) (No. GC 73-20-S) (on file with the Mississippi State University Congressional and Political Research Center in William C. Keady Papers) [hereinafter *Drew* EEOC Trial Amicus Brief].

383. *See infra* notes 383–86 and accompanying text.

384. *Drew* Plaintiffs' Preliminary Injunction Brief, *supra* note 368, at 13 (citation omitted); *see also Drew* Plaintiffs' Supplemental Memorandum, *supra* note 368, at 1–6. *See generally Drew* CCR Trial Amicus Brief, *supra* note 368 (extensively making the sex and race discrimination arguments); *Drew* EEOC Trial Amicus Brief, *supra* note 381 (making the sex and race discrimination arguments).

385. *Drew* Plaintiffs' Preliminary Injunction Brief, *supra* note 368, at 13.

386. *Drew* CCR Trial Amicus Brief, *supra* note 368, at 4.

387. *Drew* Plaintiffs' Preliminary Injunction Brief, *supra* note 368, at 13 (citation omitted); *see also Drew* Plaintiffs' Supplemental Memorandum, *supra* note 368, at 9–10 (making the "right to procreate" argument).

Embracing both the plaintiffs' rational basis and sex discrimination arguments, the district court agreed.[388] Holding the policy constitutionally invalid, the court opined that the policy could not be constitutionally sustained, regardless of whether it was deemed sex discrimination (demanding, in the court's view, strict scrutiny), or whether it was considered under rational basis review.[389] As to the rational basis argument, the court observed that "barring an otherwise qualified person from being employed . . . in the public schools merely because of one's previously having had an illegitimate child has no rational relation to the objectives ostensibly sought to be achieved by the school officials[.]"[390] Thus, the court suggested as its leading argument that the policy "is constitutionally defective under the traditional, and most lenient, standard of equal protection and violative of due process as well."[391]

On appeal before the Fifth Circuit, the plaintiffs would raise a similar constellation of issues—including not only rational basis review, but also race, sex, and fundamental rights claims—for the court's consideration.[392] But the Fifth Circuit—like the district court—affirmed simply "[o]n the basis . . . of traditional notions of equal protection, because the policy created an irrational classification . . . ."[393] Considering, and rejecting as entirely unsupported, each of the defendants' arguments for the policy's furtherance of legitimate government interests, the court concluded that—regardless of whether the policy discriminated based on sex, race, or fundamental rights—it "violated traditional concepts of equal protection," i.e., rational basis review.[394] Thus, the court sidestepped the need to grapple with the plaintiffs' complicated claims of intertwined discrimination and fundamental rights violations.

At the Supreme Court, the Justices would—like the courts below—show little taste for grappling with the plaintiffs' complicated,

388. *See* Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27, 31 (N.D. Miss. 1973).
389. *See id.*
390. *Id.* at 31.
391. *Id.* at 31–37.
392. *See generally* Brief for Plaintiffs-Appellees-Cross-Appellants, Andrews v. Drew Mun. Separate Sch. Dist., 507 F.2d 611 (5th Cir. 1975) (No. 73-3177) (on file with the National Archives at Fort Worth); Brief of the Center for Constitutional Rights, as *Amicus Curiae* in Support of the Judgment Below, *Drew*, 507 F.2d 611 (No. 73-3177) (on file with the National Archives at Fort Worth); Reply Brief for Plaintiffs-Appellees-Cross-Appellants, *Drew*, 507 F.2d 611 (No. 73-3177) (on file with the National Archives at Fort Worth); *Drew* EEOC Trial Amicus Brief, *supra* note 381.
393. *Drew*, 507 F.2d at 614.
394. *Id.* at 614–17.

intertwined arguments of discrimination and fundamental rights.[395] In briefing and oral argument, McTeer, now joined by North Mississippi Rural Legal Services and the Center for Constitutional Rights as co-counsel, raised not only the rational basis argument, but also an array of claims of sex, race, and illegitimacy discrimination—as well as claims of the infringement of fundamental rights.[396] As McTeer contended at oral argument, pulling together the threads of the argument,

> [i]f a Black woman struggles through high school, struggles through college, and then at the moment when she finally gets out of the circle of poverty is told that because she bore a child out of wedlock four years ago she cannot have a job, then indeed, the constitution is senseless to us and makes no possibility for any change.[397]

But if the need for such intersectional claims to be "tested by the strictest standard of review" was self-evident to the plaintiffs,[398] it was not so apparent to the Justices.[399] Although a number of the Justices initially believed the policy to be unconstitutional, many also struggled amidst the plethora of intertwined issues raised by the plaintiffs to find a constitutional theory with which they felt comfortable.[400] As Justice

395. *See infra* notes 399–410 and accompanying text (describing the Justices' deliberations in *Drew*).

396. *See Drew* Respondents' Brief, *supra* note 194, at 34–77; *Drew* Supplemental Brief of Respondents, *supra* note 324, at 1–4. *See generally* Brief for the Child Welfare League of America as Amicus Curiae, *Drew*, 425 U.S. 559 (No. 74-1318), *microformed on* FO-0113-75 (Info. Handling Servs. Library & Educ. Div., Katherine R. Everett Law Library, Univ. of N.C. Sch. of Law) (arguing against discrimination based on illegitimacy by urging the Court to view the case through the lens of its effects on non-marital children); Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of Equal Rights Advocates, Inc. & ACLU, *Drew*, 425 U.S. 559 (No. 74-1318) (on file with Princeton University Seeley G. Mudd Manuscript Library in ACLU Collection, Box 1350) (making a sex discrimination argument, and linking illegitimacy discrimination to historical gender stereotypes and discrimination against women).

397. *Drew* Oral Argument, *supra* note 194, at 34:21. *See generally* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, B.U. L. REV. (forthcoming) (developing a theory of where arguments based on multiple or cumulative constitutional rights should succeed).

398. *Drew* Respondents' Brief, *supra* note 194, at 76.

399. *See infra* notes 399–404 and accompanying text.

400. *See infra* notes 400–10 and accompanying text. The deliberations were complicated in *Drew*, but it appears that if all of the Justices had adhered to their initial instincts regarding the proper outcome, there would have been a majority for affirming in *Drew*. *See, e.g.*, Justice Lewis F. Powell, Jr., Docket Sheet re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1–2 (Mar. 5, 1976) [hereinafter Powell, *Drew* Docket Sheet] (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) (making clear that Justices Brennan, Marshall, and Stevens voted at conference to affirm if the Court reached the merits, although they also all indicated it was appropriate to dismiss the case as improvidently granted); Justice Harry A. Blackmun, Memorandum to Self re: Drew Mun.

Powell put it (presaging later judicial difficulties in understanding how to approach intersectional cases) "no analy[tical] framework fits this case[.]"[401] Thus, the plaintiffs' efforts to persuade the Justices to see the case as implicating an interconnected and historically grounded web of subordination targeting black women apparently did not succeed.

Indeed, only a few Justices saw any constitutionally actionable discrimination at work in the case at all—and none approached the case through the intersectional framework that the plaintiffs put forward. Thus, only Justices Brennan, Marshall, and Stevens perceived the case as implicating any form of discrimination—and then only sex discrimination.[402] For the other Justices, *Drew* was "[n]ot an E[qual]/P[rotection] case"[403] because race and sex were implicated, if at all, only by virtue of the policy's disparate impact—a constitutional theory soon thereafter rejected by the Justices in *Davis*.[404] As such,

Separate Sch. Dist. v. Andrews, No. 74-1318, at 6–8 (Feb. 17, 1976) [hereinafter Blackmun, *Drew* Memo] (on file with the Library of Congress in Harry A. Blackmun Papers, Box 223, Folder 1) (showing that Justice Blackmun also originally agreed with the decision below); Preliminary Memorandum from M., law clerk, re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1 (July 11, 1975) [hereinafter Powell, *Drew* Memo] (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) (showing Powell's handwritten notations on his clerk's memo that make clear that Powell initially believed the case was correctly decided below). However, Justice Blackmun changed his position following oral argument, and Justice Powell, although still sympathetic, struggled to find a theory he could endorse. *See* Blackmun, *Drew* Memo, *supra*, at 8; Powell, *Drew* Docket Sheet *supra*, at 1–2. Ultimately, the Justices avoided the need to decide the case by dismissing it as improvidently granted. Drew Mun. Separate Sch. Dist. v. Andrews, 425 U.S. 559 (1976) (mem.) (per curiam); *see infra* notes 415–18 and accompanying text.

401. Justice Harry A. Blackmun, Docket Sheet re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 2 (Mar. 5, 1976) [hereinafter Blackmun, *Drew* Docket Sheet) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 223, Folder 1).

402. *See* Blackmun, *Drew* Docket Sheet, *supra* note 400, at 1–2; Justice William J. Brennan, Jr., Docket Sheet re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1–2 (undated) (on file with the Library of Congress in William J. Brennan, Jr. Papers, Box I:368, Folder 6); Powell, *Drew* Docket Sheet, *supra* note 399, at 1–2; *see also* Blackmun, *Drew* Memo, *supra* note 399, at 5–6 (making clear that Blackmun—although receptive to the rational basis argument—was never receptive to the plaintiffs' sex and race discrimination arguments).

403. Powell, *Drew* Docket Sheet, *supra* note 399, at 1 (quoting Justice Powell's handwritten account of Chief Justice Burger's expressed views); *see also* sources cited *supra* note 401.

404. *See* sources cited *supra* note 402; *see also* Washington v. Davis, 426 U.S. 229, 238–48 (1976). Although not attractive to the Justices, there does appear to have been a basis for finding that the policy at issue in *Drew* was intentionally discriminatory. As the plaintiffs noted in a supplemental brief, at the time the policy was implemented, faculty desegregation had just been ordered in the district and the ranks of black teachers were in the process of being decimated. *See Drew* Supplemental Brief of Respondents, *supra* note 324, at 2. Given that moderate segregationists had long identified illegitimacy discrimination as a "neutral" way of achieving segregationist goals, there are substantial reasons to think that the two were not coincidental. *See generally* ANDERS WALKER, THE GHOST OF JIM CROW: HOW

despite the substantial ways in which the policy discriminated against and stigmatized African American women and their nonmarital children, few of the Justices were receptive to plaintiffs' race, sex, and illegitimacy discrimination arguments.[405]

Initially, it seemed that the plaintiff's rational basis arguments might—as they had in the courts below—fare better. A number of the Court's swing Justices were originally receptive to the argument that the school district's sweeping policy "was not tailored to serve a legitimate state interest"[406]—and thus failed rational basis review.[407] But, as the proceedings wore on, two of the key swing Justices (Justices Blackmun and Powell) became increasingly skeptical.[408] As the counsel for the school district repeatedly pointed out, the case "was not a class action[.]"[409] And thus, as Justice Blackmun observed in his notes, "the rule is pe[rha]ps too broad, but n[ot] for t[he]se [plaintiffs.]"[410] As such,

SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS (2009) (making clear that even in the immediate aftermath of *Brown v. Board of Education*, moderate segregationists perceived, and sought to capitalize on, the potential of illegitimacy based discrimination as a facially neutral way to achieve segregationist goals).

405. *See* sources cited *supra* notes 402–03. The Justices appear to have been even less sympathetic to the fundamental rights arguments that plaintiffs and their amici raised. *See* Blackmun, *Drew* Memo, *supra* note 399, at 1, 7 (omitting to address the privacy and "procreative choice" issues raised by plaintiffs and amicus briefs); Powell *Drew* Docket Sheet, *supra* note 399, at 1–2 (showing that none of the Justices—including those who thought *Drew* should be affirmed—argued for the case to be decided on fundamental rights grounds); *see also* sources cited *supra* note 401.

406. Powell, *Drew* Memo, *supra* note 399, at 1 (quote from Justice Powell's handwritten commentary on the front page of the preliminary memorandum concerning the *Drew Municipal Separate School District v. Andrews* case).

407. *See* sources cited *supra* notes 399, 401. Justices Powell, Blackmun, and Stevens—three of the Court's swing Justices—were all initially inclined to affirm on rational basis grounds, but by the Justices' post-argument conference, only Justice Stevens remained convinced that this was the proper approach. *See* sources cited *supra* notes 399, 401. As described *infra*, it appears that Justice Blackmun, and perhaps Justice Powell, was swayed by defense counsel's arguments that even if the policy itself was generally irrational, it was not irrational as applied to the specific plaintiffs (and the case was not a class action). *See infra* notes 408–09 and accompanying text.

408. *See infra* notes 408–09 and accompanying text.

409. *See, e.g.*, *Drew* Oral Argument, *supra* note 194, at 10:10.

410. Justice Harry A. Blackmun, Notes to Self re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1 (undated) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 223, Folder 1); *see also* Justice Harry A. Blackmun, Oral Argument Notes re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1 (Mar. 3, 1976) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 223, Folder 1) (making a note of this part of the defendant's oral arguments); Justice Lewis F. Powell, Jr., Oral Argument Notes re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1 (Mar. 3, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers) (same).

although a number of the Justices were uncomfortable with the policy, key Justices also viewed the "analysis choice" as very "difficult."[411]

Fortunately for the Justices, the contemporaneous[412] issuance of regulations under Title IX proscribing family status discrimination—as well as other forms of employment qualifications having a disparate impact on women—provided, as amici NEA noted, reason for the Court to "dismiss [the] writ of certiorari as improvidently granted."[413] As the NEA observed, and the United States would later echo, "the regulations eliminate the need to decide the constitutional issues at bar," as they would likely invalidate the rule regardless of its constitutional stature.[414] As such, both the NEA and the United States would urge the Justices to dismiss the writ without reaching the plaintiffs' complex constitutional claims on the merits.[415]

As Serena Mayeri observes, "[t]he Justices greeted these invitations to dismiss with palpable relief."[416] At conference in *Drew*, although the Justices divided closely on the merits, they overwhelmingly agreed to dismiss the case as improvidently granted ("DIG").[417] And, although at least three Justices expressed some concern regarding a DIG—an outcome which would allow the lower courts' opinions to stand—even

411. *See* Powell, *Drew* Docket Sheet, *supra* note 399, at 2 (recording his own views expressed at conference); *see also* MAYERI, *supra* note 86, at 163–64 (describing Blackmun's conflicted and evolving views on how to resolve *Drew*).

412. The Title IX regulations were issued shortly before certiorari was granted in *Drew*, but apparently were not drawn to the Justices' attention until after the grant. *See* Memorandum from DM, law clerk, to Justice Harry A. Blackmun re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1 (Apr. 26, 1976) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 223, Folder 1) ("The petition was granted on October 6, 1975, but as far as I can tell from the papers the Court was never informed of the intervening regulations . . . . Had these regulations been brought to the Court's attention, it is extremely unlikely that the Court would have taken the case.").

413. *See* Brief Amicus Curiae for the National Education Association at 2, Drew Mun. Separate Sch. Dist. v. Andrews, 423 U.S. 820 (1975) (No. 74-1318); *see also id.* at 3 (describing the Title IX rule).

414. *See id.* at 3 (arguing that the Title IX regulations "eliminate the need to decide the constitutional issues at bar, and this Court should either dismiss the writ as improvidently granted in light of the supervening change in law"); *see also* Memorandum for the United States as Amicus Curiae at 1–6, Drew Mun. Separate Sch. Dist. v. Andrews, 425 U.S. 559 (1976) (mem.) (per curiam) (No. 74-1318) (making a similar point).

415. *See* sources cited *supra* notes 412–13.

416. MAYERI, *supra* note 86, at 165.

417. *See* sources cited *supra* note 401; *see also* Memorandum from Chief Justice Warren E. Burger to the Conference re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1 (Mar. 8, 1976) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 223, Folder 1) (noting he had recorded seven of nine Justices as being in favor of a dismissing the case as improvidently granted as at least one alternative resolution at conference).

they ultimately agreed to join the Court's one-line dismissal.[418] As such, *Drew* ended in an anti-climactic denouement—with the Court allowing the Fifth Circuit's holding striking down the policy to stand, but without any reasoning from the Court itself.[419]

As Mayeri further observes, this course of events "meant that [*Drew*] would remain outside the . . . canon, little known even among legal scholars."[420] Indeed, like *King*, *Drew* too would be essentially forgotten from the constitutional canon, and thus too the rational basis canon.[421] Although the lower court opinions in *Drew* were arguably quite exceptional—striking down a policy situated at the intersection of a plethora of subordinated identities, including race, sex, poverty, and illegitimacy—*Drew* and the rational basis theory it endorsed have rarely been identified as a meaningful component of how intersectional discrimination could be addressed.[422] Instead, like *King* and other 1970s cases in which the courts struck down intersectional discrimination under rational basis review,[423] *Drew* has, in large part, ultimately been forgotten. And thus the canon has been constructed without a memory of protected class rational basis review.

* * *

As in the case of race discrimination, the Supreme Court's avoidance of women's rights litigators' "protected class rational basis review" arguments has largely erased the memory of protected class rational basis litigation from our Supreme Court-centered canon. But if the legal reasoning underlying feminist litigators' efforts has been forgotten, the impacts of those efforts have, to some extent, remained.[424] For example, the successful efforts of feminist litigators to debunk the

418. *See* Memorandum from Justice Harry A. Blackmun to Justice Byron White re: Drew Mun. Separate Sch. Dist. v. Andrews, No. 74-1318, at 1 (Mar. 23, 1976) (on file with the Library of Congress in Harry A. Blackmun Papers, Box 223, Folder 1); *see also Drew*, 425 U.S. at 559 (dismissing the case as improvidently granted without dissent).

419. *See Drew*, 425 U.S. at 559 (including one line from the Court stating that the case was being dismissed as improvidently granted without further explanation).

420. MAYERI, *supra* note 86, at 165. Here, Mayeri is referring to the feminist canon, but her observation is equally applicable to the rational basis canon and the constitutional canon generally.

421. With the notable exception of Serena Mayeri, who has extensively discussed *Drew* as an intersectional precedent, resolved in the lower courts on rational basis review, there is virtually no discussion of the potential of *Drew*'s rational basis approach to intersectional discrimination. *See* MAYERI, *supra* note 86, at 165 (noting that *Drew* brought together "opportunities for constitutional innovation" yet largely remains obscure, even among legal scholars).

422. *See id.*

423. *See supra* note 365 and accompanying text.

424. *See sources* cited *infra* notes 424–25 and accompanying text.

rationality of disfavoring pregnancy (as compared to other temporary disabilities) helped to spur the Pregnancy Discrimination Act, which today affords all employees, both public and private, the right to sue for pregnancy discrimination.[425] And, litigators ultimately succeeded in directly persuading the courts that penalties based on nonmarital birth status—so often used to penalize poor African American women—were so irrational as to warrant presumptive unconstitutionality.[426] Thus, while the early protected class rational basis cases brought by sex discrimination litigators were not an unqualified success, neither were they without impact.

Moreover, protected class rational basis claims—as a basis for arguments by sex equality advocates—never entirely disappeared. Even as the memory of 1970s-era protected class rational basis cases was forgotten, sex equality advocates would, more sporadically, continue to challenge pregnancy discrimination, as well as educational and employment practices having a disparate impact on women and girls on rational basis review—at times succeeding.[427] Part IV turns to a discussion of the reasons why such claims—by both race and gender litigators—became more difficult and less common after the 1970s, as well as a review of the possibilities offered by the present moment for revitalizing a renewed tradition of protected class rational basis review.

IV. THE POSSIBILITIES OF PROTECTED CLASS RATIONAL BASIS REVIEW

Today, cases such as *Washington v. Davis* and *Geduldig v. Aiello* are often understood as shutting down the potential of protected class equal protection litigation. Conceptualized as bringing an end to an era of expansive possibilities for constitutional race and sex discrimination litigation, cases like *Davis* and *Geduldig* are widely considered to be the

425. *See* Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)); *see also* sources cited *supra* note 36 and accompanying text.

426. *See generally* Eyer, *Constitutional Crossroads*, *supra* note 1 (discussing the way that rational basis review paved the way for heightened scrutiny to be applied to illegitimacy discrimination). Of course, this does not mean that this legal change has eradicated discriminatory disfavor of nonmarital births. *See, e.g.*, Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 352–53 (2011).

427. *See, e.g.*, Crawford v. Cushman, 531 F.2d 1114, 1122–25 (2d Cir. 1976) (finding that the Marine Corps' general rule pertaining to pregnancy was "overbroad and overly restrictive"); Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 364 (S.D.N.Y. 1989) (holding that defendants could no longer award scholarships based on discriminatory educational practices); Suarez v. Ill. Valley Cmty. Coll., 688 F. Supp. 376, 382 n.5 (N.D. Ill. 1988) (explaining that *Geduldig* should not be interpreted to mean that state officials may fire a woman because she becomes pregnant under the equal protection clause).

turning point at which the Supreme Court retreated to a narrow, formalistic vision of what race and sex discrimination "is."[428] In this telling, *Davis* and *Geduldig* are often characterized as virtually impenetrable barriers, foreclosing the types of claims of race (disparate impact) and gender (pregnancy) discrimination that the plaintiffs in those cases put forward.[429]

There is certainly some truth to this traditional account. But as the foregoing discussion suggests, the legacy of cases like *Davis* and *Geduldig* is also far more complicated than it might initially appear. *Davis* and *Geduldig* were only a small part of a wider tradition of litigating at the margins of constitutional sex and race discrimination—a tradition that had substantially and successfully adopted rational basis review. And, while certain parts of this tradition of litigating at the margins were clearly eviscerated by *Davis* and *Geduldig*, the tradition's rational basis arguments were not so obviously affected. Indeed, precisely because the Court sidestepped advocates' protected class rational basis arguments throughout the 1970s, the potential for such claims continued to exist—even after canonical cases like *Davis* and *Geduldig* were decided.

This is not to suggest that cases like *Davis* and *Geduldig* had no effect on the tradition of protected class rational basis review. Indeed, *Davis* and *Geduldig* did impact judges' perceptions of which protected class rational basis arguments could be successful, drawing courts back from the most expansive visions of what protected class rational basis review might entail.[430] But many judges also continued to perceive

428. *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 & n.17 (2012) (noting that "[t]he overwhelming consensus among constitutional scholars is that *Davis* is the source of today's failed [equal protection] doctrine, insofar as it required direct proof regarding the minds of government actors[,]" but arguing that the turning point instead came later in the decade with *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979)).

429. *See supra* notes 15, 183, 317 and accompanying text.

430. The internal deliberations that followed *Washington v. Davis* in *United States v. North Carolina* (where the three-judge district court originally invalidated North Carolina's use of the NTE on rational basis grounds) provide an illustration of how ambiguous *Washington v. Davis*'s impact was, even to those who had embraced protected class rational basis arguments. *See* United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975), *vacated by* 425 F. Supp. 789 (E.D.N.C. 1977). Thus, Judge J. Braxton Craven originally expressed the view that "*Washington* does not destroy the ground of decision [for *United States v. North Carolina*], which was that a test not shown to relate at all to teaching capacity is irrationally and arbitrarily required and, therefore, unconstitutional under Fourteenth Amendment minimal scrutiny." *See* Letter from Judge J. Braxton Craven, Jr., U.S. Court of Appeals for the Fourth Circuit, to Chief Judge Clement F. Haynsworth, Jr., U.S. District Court for the E. Dist. of N.C., & Judge Franklin T. Dupree, Jr., U.S. District Court for the E. Dist. of N.C., re: United States v. North Carolina, No. 4476, at 1 (June 28, 1976) (on file with the Duke University David M. Rubenstein Rare Book & Manuscript Library in James Braxton Craven Collection,

protected class rational basis arguments as potentially viable after *Davis* and *Geduldig*, and indeed continued to make findings for plaintiffs even in the precise contexts that those cases addressed (disparate impact and pregnancy discrimination, respectively).[431] As such, *Davis* and *Geduldig* were not, in their immediate aftermath, perceived as the immovable obstacles to race and gender justice claims that they are often characterized as today.[432]

Rather, the retreat of protected class rational basis claims seems to have been driven far more by the *general* retrenchment of the 1970s-era standards of meaningful rational basis review. As sex and illegitimacy came to be canonized within the heightened tiers, the cases that had formed the foundation of the 1970s rational basis revolution—cases like *Reed v. Reed* and *Weber v. Aetna*—were gradually stripped from the rational basis canon and reimagined as mere stepping stones to heightened scrutiny.[433] Incentives for race and gender justice litigators also shifted, as a changing legal backdrop encouraged arguments that minimized the power of rational basis review and emphasized other avenues of legal argumentation.[434] Ultimately, protected class rational

Box 266). However, by the fall, he would become persuaded that *Davis* in fact fatally undermined the *United States v. North Carolina* court's reasoning, in part because the Court had adopted "the Title 7 test of job relatedness" as the rational basis standard. *See* Letter from Judge J. Braxton Craven, Jr., U.S. Court of Appeals for the Fourth Circuit, to Chief Judge Clement F. Haynsworth, Jr., U.S. District Court for the E. Dist. of N.C., & Judge Franklin T. Dupree, Jr. U.S. District Court for the E. Dist. of N.C., re: United States v. North Carolina, No. 4476, at 1 (Oct. 1, 1976) (on file with the Duke University David M. Rubenstein Rare Book & Manuscript Library in James Braxton Craven Collection, Box 266). Ultimately, the judges would decide to reopen the case for further proceedings on the basis of *Davis*, finding that it undermined a number of the key assumptions of the prior opinion. *See* United States v. North Carolina, 425 F. Supp. 789, 792–94 (E.D.N.C. 1977).

431. *See* sources cited *supra* note 429; *see also* Cook v. Arentzen, 14 Fair. Emp. Prac. Cas. (BNA) 1643, 1977 WL 4327, at *3 (4th Cir. May 6, 1977) (invalidating pregnancy discrimination on rational basis review), *vacated*, 582 F.2d 870 (4th Cir. 1978); *Crawford*, 531 F.2d at 1121–24 (same); *cf.* Beazer v. N.Y.C. Transit Auth., 558 F.2d 97, 99 (2d Cir. 1977) (affirming invalidation of a policy having a racially disparate impact on rational basis review), *rev'd*, 440 U.S. 568, 588–94 (1979) (concluding that the policy had a rational basis).

432. *See, e.g.*, sources cited *supra* note 430 (citing sources demonstrating the understanding of *Davis* and *Geduldig* in their immediate aftermath); sources cited *supra* note 317 and accompanying text (describing a modern understanding of *Geduldig*).

433. *See supra* notes 72–75 and accompanying text (describing this turn away from robust rational basis formulations).

434. These forces were complicated and included a number of simultaneous changes in the legal context within which advocates were litigating. Among the most important was the canonization of sex as subject to intermediate scrutiny, a development which encouraged legal observers to retrospectively recharacterize cases like *Reed* and *Weber* as outside the rational basis canon, while also providing strong incentives for sex discrimination litigators to emphasize intermediate scrutiny's comparative strength—a move most easily made by drawing unfavorable comparisons to the rational basis standard. *See supra* Part I; *see also, e.g.*, Amicus Brief of Nancy Mellette in Support of Petitioner United States of America, United

basis claims would follow the trajectory of broader trends away from robust rational basis review, significantly declining (although never entirely disappearing)[435] as a deferential vision of rational basis review again became more dominant.[436]

Today, there are reasons to believe that protected class rational basis review may once again hold real potential. Rational basis review has begun to expand again generally, retreating from the ultra-deferential formulation that became common in the 1990s and early 2000s.[437] As in the 1970s, this movement has been driven largely by a particular group's claims to equality—in the 1970s, the women's rights

States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107), 1995 WL 703385, at *19–21 (contrasting rational basis review unfavorably with the sex discrimination standard). Many within the women's rights movement had from early on been comparatively unenthusiastic about—or indeed, even hostile to—rational basis arguments for sex equality, a backdrop that no doubt encouraged this trend. *See, e.g.*, Letter from Melvin L. Wulf, Legal Dir., ACLU, to Norman Redlich, Office of the Corp. Counsel, N.Y.C., re: Reed v. Reed, No. 70-4, at 1 (July 1, 1971) (on file with Princeton University Seeley G. Mudd Manuscript Library in ACLU Collection, Boxes 1654–55) (criticizing the Corporation Counsel's office for altering the city's amicus brief in *Reed v. Reed* to list its rational basis argument first); Letter from Melvin L. Wulf, Legal Dir., ACLU, to Allen R. Derr re: Reed v. Reed, No. 70-4, at 1 (Dec. 20, 1971) (on file with Princeton University Seeley G. Mudd Manuscript Library in ACLU Collection, Boxes 1654–55) (criticizing the attorney who argued *Reed*, and characterizing the resulting rational basis opinion as "bland and very narrow"). The amendment of Title VII to extend to public employers—and the enduring campaign by certain Justices of the Supreme Court to weaken its disparate impact standards—also encouraged racial justice litigators to use rational basis review as a point of comparison to disparate impact's burden on employers, with rational basis review being characterized as the weaker of the two standards. *See, e.g.*, *Nat'l Educ. Ass'n v. South Carolina* Jurisdictional Statement, *supra* note 162, at 25–26 (declining to make the rational basis argument, and instead arguing that Title VII's disparate impact standards applied to an NTE case, and demanded a higher standard than rational basis review).

435. *See, e.g.*, Lewis v. Ala. Dep't of Pub. Safety, 831 F. Supp. 824, 825–28 (M.D. Ala. 1993); Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 364 (S.D.N.Y. 1989); Suarez v. Ill. Valley Cmty. Coll., 688 F. Supp. 376, 382 n.5 (N.D. Ill. 1988); *see also* cases cited *supra* note 430 (citing protected class rational basis review cases in the immediate aftermath of *Davis* and *Geduldig*); cases cited *infra* note 438 (listing recent cases applying a protected class rational basis approach).

436. The case proceedings in *New York City Transit Authority v. Beazer*, 399 F. Supp. 1032 (S.D.N.Y. 1975), *supplemented by* 414 F. Supp. 277 (S.D.N.Y. 1976), *rev'd in part*, 558 F.2d 97 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1979), arguably provide a good example of this shift. In *Beazer*, the district court invalidated an employment policy of absolutely prohibiting methadone users from seeking employment with the transit authority—a policy having a racially disparate impact—on rational basis grounds, *see id.* at 1036. The Second Circuit affirmed *Beazer* post-*Washington v. Davis*, finding that the rational basis holding of the District Court was supported. *See Beazer*, 558 F.2d at 99. But by the time *Beazer* reached the Supreme Court, cases like *Reed* were increasingly being situated outside the rational basis canon, and thus, the Second Circuit's rational basis holding persuaded only a few Justices. *See* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979).

437. *See supra* Part I.

movement, and today, the LGBT rights movement.[438] But, like in the 1970s, the Supreme Court's failure to cabin or clarify its reasoning has opened up possibilities for other groups who wish to make rational basis claims—possibilities that are increasingly being realized, especially in the lower and state courts.[439]

This is not to suggest that rational basis review is likely to form a panacea for the limits of contemporary race and gender justice litigation. Even at its height in the 1970s, protected class rational basis review was not successful in all circumstances—where government actors did the work of identifying and proving a real connection between governmental interests and actions, they often prevailed.[440] Moreover, the move toward robust rational basis review generally is—as of yet—neither as capacious, nor as widespread, today as the movement of four decades ago.[441] As such, there is little reason to believe that we will see

438. *See supra* Part I.

439. *See supra* Part I; *see also* Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1065–67 (9th Cir. 2014) (invalidating Arizona policy refusing to provide drivers' licenses to DACA recipients on rational basis review), *petition for cert. filed*, No. 16-1180 (U.S. Mar. 31, 2017); Bush v. City of Utica, 558 F. App'x. 131, 134 (2d Cir. 2014) (concluding that discrimination against residents living in low-income neighborhood in providing emergency services lacked a rational basis under equal protection clause); United States v. Blewett, 746 F.3d 647, 671–75 (6th Cir. 2013) (Cole, J., dissenting) (arguing that the Fair Sentencing Act should be applied to offenders sentenced before its enactment, and that the failure to do so was unconstitutional in view of the lack of rational basis for the crack/cocaine disparity); United States v. Byars, No. 8:10CR50, 2011 WL 344603, at *11 (D. Neb. Feb. 1, 2011) (holding continued application of the crack/cocaine disparity to cases where the criminal conduct preceded enactment of the Fair Sentencing Act was "arbitrary and irrational" and in violation of both the equal protection and due process clauses); Mason v. Granholm, No. 05-73943, 2007 WL 201008, at *3–4 (E.D. Mich. Jan. 23, 2007) (invalidating an amendment to the state civil rights law that barred suits by prisoners on the basis of rational basis review).

440. *See, e.g.*, *supra* notes 158–63 and accompanying text (discussing how South Carolina's decision to enlist ETS to validate their use of the NTE led to a different result on litigants' rational basis claims). Yet it is striking how often, despite this fact, government actors lost. Indeed, as discussed *infra*, arguably the power of protected class rational basis review is precisely in its ability to lay bare just how weak and unjustified the governmental reasons often are for the severe burdens routinely imposed on minority groups by the operation of ostensibly neutral laws. *See infra* notes 450–57 and accompanying text.

441. At its height in the 1970s, *Reed* was regularly cited by the lower courts outside of the sex discrimination context, often in cases resulting in constitutional invalidation. *See, e.g.*, Eyer, *Constitutional Crossroads*, *supra* note 1, at 564 n.140 (documenting that *Reed* was cited in contexts other than traditional sex discrimination matters sixty-eight times in the two years from 1974 to 1975, and that the plaintiff prevailed in forty of those cases). Although today plaintiffs are beginning to have significantly greater success using the LGBT cases in other, non-LGBT contexts, see, for example, cases cited *supra* note 31, the trend is not yet as robust as it was in the 1970s. *See supra* Part I.

an immediate or sweeping reversal of the decades of retrenchment in constitutional race and gender justice litigation.[442]

And yet, there are many reasons for believing that—to the extent that equal protection litigation could hold renewed relevance in the fight for equality rights for minority communities and women today—it will be, if anything, on rational basis review.[443] Today, a realistic perspective suggests that many if not most of the important issues of race and gender justice litigation will not in fact be litigated under heightened scrutiny.[444] Issues such as felon disenfranchisement laws, the crack/cocaine sentencing disparity, and cuts to social welfare programs (programs that are disproportionately relied upon by women)[445] have all been regularly found by the courts not to trigger heightened scrutiny.[446] Indeed, the overwhelming majority of the key issues of importance to the race and gender justice communities today are ones that are unlikely to fit within

442. It is also the case that some of the successful uses of protected class rational basis review in the 1970s addressed practices that had strong overtones of intentional discrimination, perhaps making them more susceptible to constitutional invalidation generally. *See, e.g.*, *supra* Section II.B (describing the racially discriminatory origins of the NTE requirements challenged by litigants using rational basis review in the 1970s). However, some contemporary practices certainly bear comparable indicia of intentional discrimination to those challenged in the 1970s. *See, e.g.*, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 223–24 (4th Cir. 2016) (detailing the evidentiary basis for concluding that North Carolina's omnibus legislation imposing a voter ID requirement and limiting other voting practices disproportionately used by African Americans was intentionally discriminatory), *petition for cert. filed*, No. 16-833 (U.S. Dec. 27, 2016). More importantly, this fact, if true, simply further emphasizes the importance of meaningful rational basis review, as those cases unable to make a showing of intentional discrimination will necessarily be relegated to rational basis review.

443. *Cf.* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 898 (2012) (observing that "the vast majority of equal protection claims [including those of minorities] will be subject only to rational basis review").

444. *But cf. N.C. State Conference of the NAACP*, 831 F.3d at 214 (concluding that North Carolina's omnibus law regulating a variety of voting practices was enacted with racially discriminatory intent, and invalidating it on that basis).

445. *See, e.g.*, Rich Morin, *The Politics and Demographics of Food Stamp Recipients*, PEW RES. CTR. (July 12, 2013), http://www.pewresearch.org/fact-tank/2013/07/12/the-politics-and-demographics-of-food-stamp-recipients/ [https://perma.cc/TCG5-937C] (noting that women are approximately twice as likely as men to receive food stamps at some point during their lifetime).

446. *See* Marion Buckley, *Eliminating the Per-Child Allotment in the AFDC Program*, 13 LAW & INEQ. 169, 194 (1994) (welfare); Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of "Equal" Requires a Disproportionate Impact Analysis When Laws Unequally Affect Racial Minorities*, 12 CORNELL J.L. & PUB. POL'Y 85, 125 (2002) (crack/cocaine disparity); Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109, 119 (2008) (felon disenfranchisement).

the narrow constraints of what most judges are willing to "see" as discrimination.[447]

Against such a backdrop, it is vital to find ways to nevertheless push forward our national constitutional conversation surrounding race and gender justice. As Michael Waterstone recently put it in a different context,

> [T]he Fourteenth Amendment . . . by definition goes . . . to the heart of a group's claim for full citizenship under our nation's governing charter. It is the Constitution that is our "basic law" (setting a framework of governance), our "higher law" (setting the values to which the country aspires), and " 'our law'—an object of attachment that Americans see as the product of their collective efforts as a people."[448]

Or as Charles Lawrence, III, put it nearly thirty years ago, "[b]lacks and other historically stigmatized and excluded groups have no small stake in the promotion of an explicitly normative [constitutional] debate."[449] To the extent that constitutional dialog serves as the mechanism for working out our national normative commitments, finding a way in which to generate such dialog—in spite of doctrinal constraints—should be seen as a real and vital objective.[450]

Protected class rational basis review may provide just such a way to revitalize our stalled constitutional discourse around race and gender. Today, one of the principal obstacles to race and gender justice is the widely shared belief that the contemporary architecture of race and gender subordination is neutral, rational, and justified.[451] It strikes many

447. *See generally* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (describing evidence suggesting that American belief systems regularly and predictably direct adjudicators away from findings of discrimination); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1360 (2011) ("[T]oday, the Court's race discrimination cases are almost exclusively brought by white plaintiffs invoking doctrines of strict scrutiny to challenge civil rights laws.").

448. Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 557 (2014) (quoting JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 239 (2011)).

449. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 386 (1987).

450. A number of other scholars have also recently articulated the urgency of restarting our stalled constitutional dialog with respect to race. *See, e.g.*, Siegel, *supra* note 29, at 91–94; *see also* Lauren Sudeall Lucas, Essay, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1665–66 (2015). *But cf.* Earl M. Maltz, *The Supreme Court and the Quality of Political Dialogue*, 5 CONST. COMMENT. 375, 380–81 (1988) (expressing skepticism regarding whether interbranch constitutional dialogue promotes improved dialog or decision making).

451. *See, e.g.*, R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1575 (2011); *cf.* TA-NEHISI COATES, BETWEEN THE WORLD AND ME 111 (2015) ("The killing fields of Chicago,

as common sense that we disenfranchise and discriminate against felons, that we require voter identification, and that schools and workplaces are structured around a strict full-time face time norm that is unrealistic for many parents, especially mothers.[452] Certainly, not all of the work of undermining these assumptions of rationality will be done through constitutional litigation, much less rational basis review—but rational basis, by probing the thin underpinnings on which many racially and gender-impactful laws rest, may afford a rare opportunity to denaturalize and problematize widely shared assumptions about their justified nature.[453]

Importantly, such an inquiry need not and should not entail the erasure of considerations of race and gender subordination from the constitutional conversation. Many if not most cases involving protected class rational basis arguments will continue to involve the presentation of evidence of intentional race and/or gender discrimination—even if such evidence does not ultimately persuade the court.[454] Moreover, there

of Baltimore, of Detroit, were created by the policy of Dreamers, but their weight, their shame, rests solely upon those who are dying in them. There is a great deception in this.").

452. *See, e.g.*, Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 36–46 (2005) (describing the presumptions by judges that "full-time face-time" norms are a natural and essential component of work, thus causing disparate impact claims by women—often relating to their status as mothers—to fail); Ken Paxton, *Opinion: Texans Want Reasonable Voter ID*, CALLER TIMES (Corpus Christi), Sept. 14, 2016, at 6A (asserting that voter ID is a common sense measure to ensure integrity in voting); Sheila Rayam, *Opinion: Felon Vote Is Pandering at Its Finest*, DEMOCRAT & CHRONICLE (Rochester), Apr. 28, 2016, at A13, 2016 WLNR 12903495 (arguing that it is common sense that felons should not be allowed to vote).

453. *Cf.* Siegel, *supra* note 29, at 91 ("By unsettling judgments about legitimacy, equality law can amplify the voices of those who challenge tradition, even as it encourages inequality to assume new forms.").

454. *See generally* cases cited *supra* note 94 (showing cases often including extensive discussion of evidence of race discrimination, despite ultimately resolving the case on rational basis review); cases cited *supra* notes 260, 327 (same, in the sex discrimination context). To be clear, the recommendation is not to substitute rational basis claims for claims of race or sex discrimination, and indeed, historically litigators have typically brought both. *See, e.g.*, *supra* note 93 and accompanying text. Of course, there is also the possibility that courts will rely on rational basis review to avoid making findings of discrimination where they otherwise would do so. Such an outcome might secure relief in an individual circumstance, but would no doubt be undesirable from the perspective of anti-discrimination advocacy. *See generally* Charlotte S. Alexander, Zev J. Eigen & Camille Gear Rich, *Post Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 41–53 (2016) (describing the potential risks of substituting universalist claims for anti-discrimination claims). However, given the extreme reluctance of contemporary adjudicators to make findings of constitutional race and sex discrimination, it is not clear that the risks outweigh the potential benefits (especially if, as they have traditionally been, such claims are supplementary, and not substituted for affirmative race or sex discrimination claims). *See supra* note 446 and accompanying text; *infra* note 496 and accompanying text. Moreover, it appears that protected class rational basis review claims may pave the way for constitutional actors to be able to see race and gender

are obvious and compelling connections between the lack of justification for a racially impactful law and its promotion of racial injustice—connections that at least the lower courts have not traditionally struggled to see.[455] Indeed, protected class rational basis review has—when successful—often provided a forum for conversations that are otherwise extraordinarily rare in equal protection litigation regarding the taken-for-granted harms caused to minority communities by "common sense," but ultimately unsupported, laws.[456]

One need not stretch one's imagination far to imagine the potential of such a dialog to meaningfully transform our constitutional conversation around race and sex. Just as robust rational basis review of the reasons for same-sex marriage bans ultimately stripped those bans of

injustice precisely because racially or gender-impactful laws are no longer viewed as justified by important neutral government interests. *See, e.g.*, *infra* notes 464–72 and accompanying text (showing how the undermining of the rationality of the reasons for the crack/cocaine disparity has led to widespread acknowledgment by public figures that it is racially discriminatory). Thus, it is not clear that protected class rational basis claims should be seen as in competition with direct race and gender justice findings; rather they may in some circumstances be a necessary precursor to such findings.

455. There is a fairly striking divide between the lower courts and the Supreme Court in the historical willingness to engage with race and gender justice issues in the context of the adjudication of protected class rational basis claims. *See generally supra* Parts II–III (describing the widespread success of gender and racial justice claims on rational basis review in the lower courts, and the tendency of the Supreme Court to instead avoid adjudicating such arguments). As described, *see infra* notes 459–63 and accompanying text, there are compelling reasons to believe that a protected class rational basis strategy has the greatest potential in the context of the lower and state courts—the arenas in which the vast majority of constitutional litigation is actually resolved, *see, e.g.*, Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 987–88 (2010) (describing research by Seth Kreimer which found that in one year, federal trial courts decided about 330 challenges to the constitutionality of statutes). Note that certain variants of the ways that the lower courts reasoned about this issue are no doubt foreclosed by *Washington v. Davis*. In particular, triggering of Title VII standards on the basis of a showing of racial impact—one popular approach to protected class rational basis review in the 1970s—is clearly no longer the law. *See, e.g.*, sources cited *supra* note 166. But this was only one of the many ways that the courts have approached this issue. *See generally supra* Parts II–III (describing a variety of different ways that the courts applied rational basis review to racial justice and gender justice claims).

456. *See* sources cited *supra* note 453. One might argue that the issues of today are less obvious in their racial targeting than, for example, the early testing requirements discussed, *see supra* Section III.A, and thus that judges might today be less likely to recognize their interconnections with racial justice or address them meaningfully on rational basis review. But even in the 1970s, there were real debates about whether teacher testing requirements were imposed for intentionally discriminatory purposes—just as conversely, today, there are real reasons to think many laws with a racially disparate impact were enacted at least in part because of the race of those they affect. *See* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214–15 (4th Cir. 2016), *appeal docketed*, No. 16-833 (U.S. Dec. 30, 2016). Moreover, in modern situations in which courts have relied on protected class rational basis review, such as the crack/cocaine disparity, they have not struggled to see these connections. *See infra* notes 464–72 and accompanying text.

their public legitimacy, so too demanding a real accounting of the reasons for racially and gender-impactful laws may hold the seeds of such laws' delegitimation.[457] And such delegitimation is a necessary step if we are to create the type of empathy that lies at the heart of any real contemporary race or gender justice reform.[458] It is only by undermining the sense of justification—and, in certain contexts, urgency—that the American public feel about maintaining contemporary structures of systemic oppression that we can hope to take steps toward real reform.

To be clear, such a strategy would likely not entail the Supreme Court-centric approach that most constitutional law teachers and scholars embrace.[459] As delineated above, the Supreme Court has never been the primary forum for successful protected class rational basis claims, and there are few reasons for believing that it would be the primary forum for such efforts today.[460] Rather, it is the lower federal

457. *See, e.g.*, Bambauer & Massaro, *supra* note 29, at 300–01 (noting that "[t]he strategy worked" in same-sex marriage cases of "push[ing] hard on the irrationality point and demand[ing] open and transparent reasons for the laws"); Eyer, *The Canon*, *supra* note 1, at 26–28, 41–43 (describing how back-end rational basis review, finding marriage bans to be irrational, paved the way for the Supreme Court's ultimate decision in *Obergefell*); *see also* Mary Bonauto, 27th Annual State Constitutional Law Lecture, Rutgers Law School (Feb. 2, 2016) (noting that LGBT rights advocates—even in the early state court marriage ban challenges—presented strong rational basis arguments, because they wanted the courts to see and address the irrationality of the reasons for bans on same-sex marriage). This is not meant to reduce the decades-long campaign for same-sex marriage to this single discursive move. Evidently, a wide array of factors have influenced the success of the marriage movement, including, many would argue, the increased visibility of LGBT people themselves. *See, e.g.*, Radhika Rao, *Selective Reduction: "A Soft Cover for Hard Choices" or Another Name for Abortion?*, 43 J.L. MED. & ETHICS 196, 203 (2015) (suggesting that "[t]he increased visibility of LGBT families may have prompted a transformation in the perceptions of homosexuality in our society and furthered the movement for marriage equality" (citation omitted)). But as scholars such as Kenji Yoshino have suggested, there has also been a unique power in putting "on trial" the arguments of marriage equality opponents. *See* KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 7–8 (2015). *See generally* Jeremy Byellin, *Same-Sex Marriage in the States Since* Windsor*, Part 1*, LEGAL SOLUTIONS BLOG (June 11, 2014), http://blog.legalsolutions.thomsonreuters.com/top-legal-news/sex-marriage-states-since-windsor-part-1/ [https://perma.cc/VAS3-9NCV] (describing several of the decisions that followed *Windsor*, invalidating state bans on same-sex marriage on rational basis review).

458. *Cf.* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 244 (rev. ed. 2012) ("Seeing race is not the problem. Refusing to care for the people we see is the problem.").

459. *See, e.g.*, J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1002–03 (1998) (noting that "[a]lthough much important constitutional law is decided in circuit and district courts, constitutional law casebooks tend to emphasize only the Supreme Court's decisions[,]" and more broadly critiquing the Supreme Court-centric nature of the constitutional canon (citation omitted)). *See generally* Eyer, *The Canon*, *supra* note 1 (making a similar observation specifically with respect to rational basis review).

460. *See supra* Parts II–III. One need only look at the key swing vote at this juncture—Justice Kennedy—to be pessimistic about the Court's willingness to embrace an expansive

courts—and their state court counterparts—that hold real promise as sites of protected class rational basis review.[461] Empowered by the Supreme Court's renewed willingness to invalidate laws outside of the heightened tiers[462]—and by the "durable doctrinal confusion"[463] that has characterized equal protection's minimum tier review—there are myriad and multi-sited opportunities today for advocates to invite judges to take seriously their role in evaluating the constitutional stature of contemporary race and gender injustice. And in a constitutional system like ours, in which constitutional discourse—and ultimately constitutional law—is built out across a diverse collection of public, political, judicial, and social movement actors, such contributions, whatever their source, matter.[464]

Indeed, the dramatic reduction of the crack/cocaine sentencing disparity in recent years shows precisely the potential of this type of multi-sited (and even ultimately unsuccessful) judicial action.[465] Even in

constitutional jurisprudence benefitting women and racial minorities, regardless of its doctrinal framing. *See* Robinson, *supra* note 24, at 199–200 (describing Justice Kennedy's comparatively discouraging voting record on cases involving race and sex discrimination).

461. State courts provide an especially intriguing area of opportunity, given the ability of state courts to differentiate their state constitutional standards of rational basis review. *See, e.g.*, Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., 171 P.3d 1110, 1124 (Alaska 2007) ("[U]nder Alaska's equal protection clause, we do subject legislation to a more exacting inquiry than under the federal rational basis test . . . ."); *see also* State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (finding Minnesota's crack/cocaine disparity unconstitutional on rational basis review under the state constitution).

462. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (striking down federal law whose "principal purpose is to impose inequality"—not relying on heightened scrutiny); Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) ("Our cases have recognized successful equal protection claims . . . where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (citation omitted)); Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that a Colorado constitutional amendment barring the treatment of LGBT individuals as a protected class failed rational basis review).

463. *See* Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 B.Y.U. L. REV. 575, 611–25 (2016) (naming, and describing, the phenomenon of "durable doctrinal confusion[,]" and suggesting there may be a "beneficial generative impact of doctrinal confusion on constitutional development").

464. On the issue of the role that the lower courts and state courts may or should play in the development of popular constitutional understandings, and ultimately constitutional law, see generally Aronson, *supra* note 454 (describing constitutional practice in the lower courts and suggesting "inferiorizing" judicial review in order to enhance popular constitutional participation); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197 (2013), http://www.yalelawjournal.org/forum/lower-court-popular-constitutionalism [https://perma.cc/XE85-ZFBX] (developing a descriptive theory of how the lower courts may be unique as agents of popular constitutionalism); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010) (describing how state judicial elections can and have served as vehicles of popular constitutionalism).

465. *See infra* notes 465–72 and accompanying text. As described, *see infra* note 465, not all of these cases were successful as litigation—in some, judges expressing the view that the

an era when rational basis review was generally taken to be thin and permissive, lower and state courts occasionally interrogated the crack/cocaine disparity on constitutional grounds, finding its premises woefully unjustified, and emphasizing the devastating and troubling effects of its racially disparate impacts.[466] Over time, these decisions helped to build a public—and ultimately congressional—consensus around the notion that the disparity was irrational and racially harmful, which ultimately led to a dramatic reduction in the disparity ratio (and may lead to its elimination).[467] Through this long process, racial justice

crack/cocaine disparity lacked a rational basis were overruled, or were in dissent, or felt themselves bound by circuit precedent to nonetheless affirm the law. However, as described, *see infra* notes 466–72 and accompanying text, even this discourse appears to have helped to delegitimize and ultimately largely dismantle the crack/cocaine disparity.

466. *See, e.g.*, *Russell*, 477 N.W.2d at 888–91; *see also* United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) (concurring because bound by circuit precedent, but arguing that "[n]either this record nor the ones on prior occasions support the view that Congress had a sound basis to make the harsh distinction between powder and crack cocaine"); United States v. Burroughs, 897 F. Supp. 205, 213 n.13 (E.D. Pa. 1995) (noting that if it were addressing the issue de novo—not under the weight of circuit precedent—"it might well have declared the sentencing scheme to be unconstitutional under rational review"); *cf.* United States v. Alton, 60 F.3d 1065, 1067–71 (3d Cir. 1995) (overruling district court decision that had departed from crack mandatory minimum based on the district court's conclusion that the crack/cocaine disparity was "arbitrary and capricious"); United States v. Clary, 846 F. Supp. 768, 796–97 (E.D. Mo.) (concluding that the crack/cocaine disparity was racially discriminatory and "arbitrary and irrational"), *rev'd*, 34 F.3d 709 (8th Cir. 1994); United States v. Majied, No. 8:CR91-00038(02), 1993 WL 315987, at *4–5 (D. Neb. July 29, 1993) (rejecting constitutional challenge based on circuit precedent, but departing downward based on racial impact and thin factual underpinnings), *aff'd in part and vacated in part sub nom.* United States v. Maxwell, 25 F.3d 1389 (8th Cir. 1994).

467. The U.S. Sentencing Commission's first Notice of Proposed Rulemaking on the issue of whether the crack/cocaine disparity was justified was issued almost exactly a year after the Minnesota Supreme Court in *State v. Russell* became the first court to strike down a crack/cocaine disparate sentencing law on rational basis review. *See Russell*, 477 N.W.2d at 888–91; Issue for Comment, 57 Fed. Reg. 62,851, 62,851 (Dec. 31, 1992). The report and recommendations issued by the U.S. Sentencing Commission several years later (which embraced some of *Russell*'s arguments) would help fuel a multi-year series of congressional efforts to eliminate or reduce the crack/cocaine disparity—efforts that ultimately succeeded in significantly reducing the disparity. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841(b)(1) (2012)); U.S. Sentencing Comm'n, Notice, Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,076–77 (May 10, 1995); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 7–8 (1995); *see also* United States v. Byars, No. 8:10CR50, 2011 WL 344603, at *3–4 (D. Neb. Feb. 1, 2011) (describing the origins of the Fair Sentencing Act). Since that time, a number of decisions in the lower federal courts have continued to question the remaining disparity, as well as the lack of full retroactivity of the Fair Sentencing Act, often deploying rational basis review. *See, e.g.*, United States v. Blewett, 746 F.3d 647, 666–68, 670–71, 673–75, 680–85, 696–98 (6th Cir. 2013) (en banc) (various concurring and dissenting opinions); *Byars*, 2011 WL 344603, at *11. In the last several years, there have been multiple bills introduced in Congress that would further reduce or eliminate the disparity entirely, or make the Fair Sentencing Act fully retroactive. *See, e.g.*, Sentencing Reform Act of 2015, H.R. 3713, 114th Cong. (2d Sess. 2015); Fairness in

perspectives on the crack/cocaine disparity—long articulated by racial justice organizations, but once widely characterized as unjustified—have become a part of and even dominant in the mainstream discourse.[468]

It is hard to overstate the extent of this shift. In 1991, when the Minnesota Supreme Court struck down its state's crack/cocaine sentencing disparity on rational basis review, its arguments, adopted from racial justice advocates, were far from the legal and political mainstream.[469] Thus, the notion that the disparity was irrational—resting on unsupported assertions of crack's unique dangerousness and spillover effects, and having devastating impacts on African Americans—was rejected by many leading politicians as deeply erroneous, and indeed dangerous.[470] And yet by 2007, opinions regarding the veracity of the arguments underpinning the disparity had shifted sufficiently such that then-presidential candidate Barack Obama could make a campaign promise to end the disparity, contending that no "real difference" between crack and cocaine existed, except "the skin color of the people using them."[471] In the legislative action that followed, political leaders in Congress—some of whom voted for the initial federal disparity—similarly disparaged the thin underpinnings of the disparity, recognizing the unsupported and racially devastating impact of the law.[472] Thus, protected class rational basis review helped—over the course of twenty years—to create the space for a nearly complete reversal of public

Cocaine Sentencing Act of 2015, H.R. 1255, 114th Cong. (1st Sess. 2015); Mandatory Minimum Reform Act of 2015, H.R. 3530, 114th Cong. (1st Sess. 2015).

468. This can be seen most strikingly in the contrast between the disfavor with which a majority of Congress greeted the rationales behind the U.S. Sentencing Commission's original recommendations to eliminate the disparity in 1995, *see, e.g.*, H.R. REP. NO. 104-272, at 2–3 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 335–36; *see also* United States v. Lewis, 90 F.3d 302, 305 (8th Cir. 1996), as compared to the wide acceptance of such arguments in public discourse today, *see, e.g.*, *Blewett*, 746 F.3d at 672–73 (Cole, J., dissenting) (quoting contemporary leadership endorsing rationales); *id.* at 677–80 (Clay, J., dissenting) (same); *Byars*, 2011 WL 344603, at *4–6 (same).

469. *See* sources cited *supra* note 467 (making clear that many leading political figures in Congress, as well as then-President Clinton, continued as late as 1995 to adhere to the view that crack was uniquely dangerous and that this dangerousness demanded heavier sanctions than powder cocaine).

470. *See supra* note 468 and accompanying text.

471. *See* Barack Obama, XLIV President of the United States: 2009–2017, Remarks at the Howard University Convocation in Washington, D.C. (Sept. 28, 2007), http://www.presidency.ucsb.edu/ws/index.php?pid=77014&st=&st1= [https://perma.cc/6R87-N8D2] (promising to eliminate the crack/cocaine disparity).

472. *See* sources cited *supra* note 467 (quoting numerous statements by legislators—including some who enacted the original disparity—embracing the notion that justifications for the crack/cocaine disparity lacked veracity, and that the disparity had discriminatory racial effects).

perceptions regarding the fairness and necessity of the crack/cocaine disparity.[473]

Similar dynamics can be seen in the historical protected class rational basis review struggles recounted herein. Even where the protected class rational basis litigation efforts of race and gender justice litigators ultimately culminated in an unfavorable or anticlimactic Supreme Court decision, many such efforts also resulted in durable shifts in perceptions of the fairness and equality stakes of the practices that they challenged.[474] Thus, by the time the Court extended *Geduldig*'s holding that pregnancy discrimination is not sex discrimination to Title VII in 1976 in *General Electric Co. v. Gilbert*,[475] Congress quickly responded by amending Title VII to proscribe pregnancy discrimination against both public and private employees.[476] Similarly, although rational basis challenges to the NTE ultimately experienced an anticlimactic denouement in the Supreme Court, ETS (the test's maker) later removed the test from the market, in recognition of widespread criticism of its limited assessment value and racially biased results.[477] Thus, the process of undermining the legitimacy of racially and gender-impactful practices—a process that protected class rational basis review uniquely promotes—can have and, in fact, has had lasting legal and practical impacts, even absent Supreme Court endorsement or review.

Such a messy long-range approach to addressing the equality issues of today may seem unsatisfying and inadequate to address the urgency of the contemporary racial and gender justice task. But realistically, this is how constitutional change operates, even when it ultimately culminates in a Supreme Court decision. The arrival of marriage

473. Judges' willingness to interrogate the crack/cocaine disparity's rationality no doubt is not the only force behind this shift, which has been driven by vigorous and continuing social movement efforts against mass incarceration. *See, e.g.*, Michelle Alexander, *Take Action*, NEW JIM CROW, http://newjimcrow.com/take-action [https://perma.cc/N8CF-JVEP] (describing a host of social movement organizations dedicated to acting to end mass incarceration and to ameliorate its consequences). However, the timing of certain events (including, for example, the U.S. Sentencing Commission's initial questioning of the disparity) strongly suggests that such decisions have helped imbue social movement arguments with increased legitimacy, opening space for the penetration of such ideas into mainstream constitutional and political discourse. *See generally supra* note 466 and accompanying text (describing the sequence of events leading to the Fair Sentencing Act). For a more extended discussion of the ways that rational basis review may facilitate constitutional change in conversation with the political branches, see generally Eyer, *The Canon*, *supra* note 1.

474. *See infra* notes 475–76 and accompanying text.

475. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

476. *See* Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

477. *See, e.g.*, *NYC Teachers Protest Exam*, *supra* note 165.

equality in *Obergefell v. Hodges*[478] appears rapid to many—but in fact the first challenges to same-sex marriage bans were heard in the 1970s, nearly fifty years ago.[479] *Brown v. Board of Education* followed decades of litigation and social change, and itself precipitated decades more of litigation over its enforcement.[480] Constitutional change is deeply entwined with constitutional culture, and changing constitutional culture takes time.[481] What we begin today through protected class rational basis review may bear fruit only during a subsequent era—but that will be true of any serious efforts at constitutional change.

What then, might all this counsel for those committed to contemporary race and gender justice? First and foremost, it suggests that the project of ensuring that robust rational basis review endures—regardless of the trajectory of LGBT equality law[482]—ought to be a priority for those concerned about race and gender justice reform.[483] After sex and illegitimacy were canonized within the heightened tiers,

478. 135 S. Ct. 2584 (2015).

479. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. 1973), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Baker v. Nelson, 191 N.W.2d 185, 186–87 (Minn. 1971) (en banc), *appeal dismissed*, 409 U.S. 810 (1972), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see also* Singer v. Hara, 522 P.2d 1187, 1188–97 (Wash. Ct. App. 1974). For a fascinating accounting of this era of same-sex marriage litigation, and the differing goals and significance that the early same-sex marriage litigation had (as compared to the contemporary same-sex marriage movement), see generally Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015).

480. *See Landmark:* Brown v. Board of Education, NAACP LEGAL DEF. & EDUC. FUND, http://www.naacpldf.org/case/brown-v-board-education [http://perma.cc/LL2V-28S3] (summarizing the history of *Brown*, including the campaign that led to *Brown* as well as the long efforts to enforce it that have followed).

481. *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (providing a detailed historical inquiry, and demonstrating that the Supreme Court has historically moved slowly and in close keeping with social and political norms regarding racial equality). For a discussion of the reciprocal role of constitutional culture in shaping constitutional law, see generally, Siegel, *supra* note 42.

482. It is not clear at this juncture whether the LGBT community will ultimately be deemed a "suspect" or "quasi-suspect" class (or otherwise be treated as warranting some special form of review). At present, the Supreme Court has not indicated that such specialized review is appropriate. *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013) (failing to address the question of whether gays and lesbians are entitled to any special form of scrutiny, and holding for gays and lesbians without explicitly applying any heightened form of review); Romer v. Evans, 517 U.S. 620 (1996) (same). As discussed *infra* notes 482–90 and accompanying text, to the extent that the Court finds that the LGBT community is entitled to specialized review as a class in future cases, there is a risk that early cases such as *Romer* and *Windsor* will be written out of the rational basis canon—just as cases like *Reed* and *Weber* were written out of the canon decades ago.

483. For a discussion of how the legal community's responses to the trajectory of LGBT law could potentially impact the availability of meaningful rational basis review, see *infra* notes 485–90 and accompanying text.

scholars and teachers (and to some extent practitioners) largely abandoned efforts to preserve cases like *Reed* and *Weber* as rational basis precedents, characterizing such cases instead as "[h]eightened scrutiny under a deferential, old equal protection guise."[484] Despite the fact that such cases were widely understood in the 1970s as generally applicable rational basis precedents—an understanding that was never repudiated by the Supreme Court—the canon was, over time, rewritten by multiplicitous acts of recharacterization and omission.[485] Thus, the academic legal community widely acceded to—and indeed arguably drove—the erasure of the sex and illegitimacy cases from the rational basis canon.

The outcome need not be the same today—regardless of whether the courts ultimately embrace a formal heightened scrutiny approach to anti-LGBT discrimination.[486] *Romer v. Evans*[487] and *United States v. Windsor*[488] were—by the Court's own account—not applications of formally heightened review,[489] and we can and should take them seriously on their own terms. But there are troubling signs that the erasure of cases like *Romer* and *Windsor* from the rational basis canon is, in many respects, already under way. Just as cases like *Reed* and *Weber* were reimagined as covert "heightened scrutiny" cases—rather than applications of true minimum tier review—scholars have already begun to characterize cases like *Romer* and *Windsor* as "purport[ing]" to apply rational basis review.[490] In casebooks, cases like *Romer* and *Windsor* increasingly appear in a separate section for sexual orientation—rather than in discussions of the general standards for

484. *See* Eyer, *Constitutional Crossroads*, *supra* note 1, at 533 n.21 (quoting SULLIVAN & GUNTHER, *supra* note 74, at 683); *see also id.* at 535, 573 & n.175; *supra* note 433 (describing the shifting incentives in relation to this issue for race and gender justice litigators).

485. *See* sources cited *supra* note 483.

486. I am someone who strongly supports heightened scrutiny for sexual orientation and gender identity discrimination, and who has written as much in the past. *See, e.g.*, Eyer, *supra* note 26, at 7–11. However, I think it serves neither those groups who still remain unprotected, nor those who will have protections under the new regime, to strip away the potential of rational basis review. *See generally supra* note 23 (describing my prior work detailing the continued importance of meaningful rational basis review to those both within and outside of the protected classes).

487. 517 U.S. 620 (1996).

488. 133 S. Ct. 2675 (2013).

489. *See id.* at 2692–96 (citing rational basis precedents, and not specifying that any heightened scrutiny doctrine was applicable); *Romer*, 517 U.S. at 632–36 (applying rational basis review explicitly); *see also Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (noting that the majority did not apply strict scrutiny and appeared to apply rational basis review).

490. *See, e.g.*, COHEN & VARAT, *supra* note 74, at 654–55; SULLIVAN & FELDMAN, *supra* note 15, at 751.

rational basis review.[491] The history of protected class rational basis review—and its potential today—suggest that we ought to question such developments, insofar as we value the potential to interrogate discrimination, even in its less obvious or intentional forms.

Similarly, when considered against the backdrop of the protected class rational basis review, we may view with greater concern many contemporary scholarly efforts to bring order to the chaotic terrain of the Court's rational basis tradition. In particular, the scholarly turn towards defining the LGBT rights cases as exclusively based on "animus doctrine"—and defining animus as the gatekeeping criteria to the new heightened scrutiny,[492] "rational basis with 'bite' "[493]—appears more

491. *See, e.g.*, RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 887–902 (10th ed. 2012); SULLIVAN & FELDMAN, *supra* note 15, at 745–67.

492. To be clear, much of this is thoughtful scholarship that I admire, and, as described more fully later, *see infra* note 494, I understand there may be costs to *not* pursuing the systematization of rational basis doctrine. However, I would suggest that the problems that have arisen from the reification of "special" categories of review, to which gatekeeping criteria are applied, counsel caution in pursuing a similar approach with regard to the one remaining arena in which essentially any party can make claims. For recent prominent works developing the theory of "animus," see generally WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017) (providing a book-length treatment on the subject of animus, and developing a theory of where and how animus applies); Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2013) (describing the "concept of animus" and suggesting that *Windsor* built upon this principle, and is defensible as an application of it); Pollvogt, *supra* note 442 (articulating a theory of animus doctrine, and concluding that "the doctrine of unconstitutional animus gives life to the strong anti-caste mandate of the federal Equal Protection Clause").

493. Not all scholars agree that animus should trigger "rational basis with 'bite' " as opposed to absolute invalidation. *See, e.g.*, Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 492–95 (1998). However, as Pollvogt observes, "[p]erhaps the most mainstream theory of animus is that it is nothing more than a trigger for the mythical creature of 'heightened rational basis review.' " Pollvogt, *supra* note 442, at 929. However, most of the prominent recent works to discuss animus *do* situate animus as the explanation for the LGBT rights cases—and often generally for victories on rational basis review—and thus strongly imply that it is the exclusive gatekeeper to rational basis success. *See, e.g.*, ARAIZA, *supra* note 491, at 3–4; Carpenter, *supra* note 491, at 248–84; Pollvogt, *supra* note 442, at 898–900. As such, animus is situated as a gatekeeping criteria to meaningful review (whether that meaningful review is complete invalidation, or simply "rational basis with bite"). Finally, I should observe that several recent scholars of animus have embraced objective conceptions of animus that potentially offer expansive possibilities, perhaps even for those within the protected classes. *See, e.g.*, ARAIZA, *supra* note 491, at 163–72; Susannah William Pollvogt, *Cleburne* Not *Romer*: Objective Versus Subjective Theories of Animus 8–10 (June 5, 2015) (unpublished manuscript), ssrn.com/abstract=2615027 [https://perma.cc/JPW6-3H8S (staff-uploaded archive)]. It is at least partially my pessimism regarding the courts' willingness to embrace a theory that deeply divorces a common sense term from its every-day meaning, especially in the discrimination context, that drives my concerns about the animus project. *Cf.* Carpenter, *supra* note 491, at 236 (noting that "very few litigants will successfully use the animus doctrine"). *See generally* Eyer, *supra* note 446 (describing research demonstrating that most observers are unwilling to deviate from their common sense beliefs

troubling when we remember the historical implications of such tierification for sex and racial justice claims.[494] Although this impulse towards order is understandable (and indeed has been at times embraced by this author),[495] it is arguably counter-productive insofar as it is precisely rational basis review's stature as a "persistent[ly] . . . confus[ed]"[496] area of the doctrine that preserves its potential for disruptive deployment.[497] Especially in light of the

about what discrimination is, and that those beliefs tend to cause individuals to be reluctant to make findings of discrimination).

494. *See, e.g.*, Robinson, *supra* note 24, at 172–74 (describing the ways that gatekeeping criteria have been used under the modern tiers to prevent the claims of racial minorities from gaining traction). *See generally* Goldberg, *supra* note 26 (offering an extended critique of the way that the tiers may be counterproductive to equality efforts); Siegel, *supra* note 29 (describing extensively the ways that racial justice causes have suffered under the current tiered framework).

495. *See generally* Eyer, *Constitutional Crossroads*, *supra* note 1 (addressing the potential of the modern constitutional moment for those outside the protected classes, and attempting to identify common characteristics of the successful rational basis cases in the Supreme Court). From a progressive perspective, there are two major potential drawbacks to *not* systematizing rational basis review in this way. First, lower courts may not systematically afford robust rational basis review in *any* context without a regime that better clarifies where applications of robust rational basis review are appropriate. *Id.* at 579 n.203 (noting that a better descriptive account of where the Supreme Court has in fact applied meaningful review might help courts to consistently apply such review in similar cases). Second, an untethered rational basis review is potentially open to all comers, including corporate challengers of progressive economic legislation (although such challenges have in fact rarely succeeded). *See, e.g.*, Visiting Homemaker Serv. v. Bd. of Chosen Freeholders, No. HUD-L-1332-03, 2004 WL 369869, at *1 (N.J. Super. Ct. Law Div. Jan. 2, 2004) (invalidating living wage law applicable to county contractors on *inter alia* equal protection rational basis grounds), *rev'd*, 883 A.2d 1074, 1081 (N.J. Super. Ct. App. Div. 2005). I acknowledge the reality of these concerns, but ultimately have come to believe that it poses greater risks to marginalized and historically disadvantaged groups to impose rigid gatekeeping requirements on the exclusive remaining form of equal protection argumentation that allows status quo-disrupting arguments, than the risks posed by the unbounded alternative.

496. Schmidt, *supra* note 462, at 575.

497. Arguably, rational basis review is one of the few true "disruptive technologies" available to social movement actors in the contemporary constitutional litigation regime. For social movements working on behalf of those currently outside the upper tiers, this is most obviously true, as the "test" for "protected classes" has not for many years—and arguably has never—operated as a true entry-point for more rigorous scrutiny of discrimination against new entrants. *See, e.g.*, Eyer, *Constitutional Crossroads*, *supra* note 1, at 554–63; Yoshino, *supra* note 54, at 757. *See generally* Eyer, *The Canon*, *supra* note 1 (making this argument extensively). However, this is also true for those within the protected classes, who are today constrained by rules that render resort to heightened scrutiny largely unavailable and/or inefficacious as a means of disrupting contemporary structures of race and gender subordination. *See, e.g.*, ALEXANDER, *supra* note 457, at 97–139; IAN HANEY-LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVESTED RACISM AND WRECKED THE MIDDLE CLASS 41–46 (2014). Rational basis review, in contrast, has a sufficiently varied case law that a diversity of results can be reached by a lower court judge in many cases—a feature that has often been critiqued, but is arguably beneficial to those seeking to make claims disruptive of the contemporary legal and societal status quo. *See, e.g.*,

increasingly expansive approaches to rational basis review that the Court's LGBT rights cases have inspired in the lower courts (approaches that are far from limited to "animus" based applications), we ought to proceed with caution in imposing a framework on the Court's muddled jurisprudence that at least one leading proponent has acknowledged will benefit "very few litigants[.]"[498]

Finally, for those who are teachers and keepers of the canon, the reality of protected class rational basis review—historically and today—counsels a serious reevaluation of how we think, write, and talk about how equal protection protects.[499] We build the very barriers that we decry to the extent that we construct heightened scrutiny—and its rigid requirements for entry—as the exclusive method for challenging race and gender injustice. Heightened scrutiny—and the findings of intentional race or sex discrimination it entails—is one pathway to change for race and gender justice, and arguably still an important one. But sometimes it is from the bottom up, by excavating the crumbling foundations and laying them bare, that race and gender injustice are exposed. Meaningful rational basis review offers such an opportunity to interrogate and expose the thin underpinnings of race and gender injustice today; it is one we should take up, and advance.

CONCLUSION

It is unsurprising and perhaps inevitable that constitutional law "on the books"—the constitutional law described by our treatises, our casebooks, our canonical accounts—bears only faint resemblance to the vast messy expanse of constitutional law's possibilities.[500] To the extent we strive toward a coherent account of the law, it is precisely the craft of

Bambauer & Massaro, *supra* note 29, at 285, 340–41 (observing that the rational basis test "has enough slack in the rope to allow lower courts to experiment and respond adequately to new problems" and generally offering a positive account of the benefits of an "open-ended and vague" approach to rational basis review); *cf.* Schmidt, *supra* note 462, at 617–24 (making a similar observation about the possible values of persistent doctrinal confusion in certain other areas of constitutional law).

498. Carpenter, *supra* note 491, at 236; *see also* cases cited *supra* note 31. *See generally* Eyer, *The Canon*, *supra* note 1 (extensively discussing this issue and describing the variety of ways that the courts have approached meaningful rational basis review, which have not been limited to an animus model).

499. *Cf.* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113–14, 1119 (1997) (developing the "preservation-through-transformation" theory of how status regimes reproduce themselves following legal reform).

500. *See generally* Balkin & Levinson, *supra* note 458 (describing extensively ways that our constitutional canon, as described in casebooks, and taught to new law students, offers an incomplete and problematic account of constitutional law); Eyer, *The Canon*, *supra* note 1 (same, with respect to rational basis review specifically).

categorization and omission, of limitation and simplification to which we inevitably aspire.

But we ought not to confuse this simplified account with reality. Today, a canonical account would teach that racial minorities and women must prove that the laws burdening them were adopted because of invidious intent—and, by inverse implication, that laws that "merely" impose racial and gender harms are constitutional.[501] But the history of protected class rational basis review suggests that this syllogism is false, or at least incomplete; that when meaningful rational basis review is applied, many racially and gender-impactful laws will fall.[502]

Today, we are again poised at the cusp of an era of rich possibilities for robust rational basis review—and with it, rich possibilities for renewed race and gender justice claims. Such a rational basis approach does not sit comfortably within the contemporary canon—which situates race and gender justice as exclusively the concern of, and delimited by—the jurisprudence of the heightened tiers.[503] This Article suggests that to the extent this conflict is irremediable, it is the canon itself that we ought to reimagine and ultimately revise.

501. *See supra* notes 15–17 and accompanying text.

502. *See generally supra* Parts II–III (describing successful race and gender justice claims brought on rational basis review).

503. *See supra* notes 15–17 and accompanying text.